IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1016

JACKSON D. LEONARD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Jackson D. Leonard ("Leonard") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on August 28, 1975, affirming a judgment of conviction entered in the United States District Court for the Southern District of New York on March 7, 1975, after a seven-day jury trial.

In a decision of far-reaching importance, the Second Circuit:

(1) Created a conflict with decisions of the First, Fourth and Ninth Circuits, which all held that the Internal Revenue Service ("IRS") must comply with its published

rules and regulations requiring its agents to give specified warnings to taxpayers suspected of criminal tax fraud.*

(2) Sanctioned a massive and unprecedented mail watch which was virtually unlimited in scope and involved the interception of all mail from Switzerland arriving at John F. Kennedy airport in New York City during two entire four month periods in 1968 and 1969 and which violated applicable Post Office Regulations and the United States Constitution.

(3) Created a conflict with the decisions of the Fifth and Eighth Circuits, *United States* v. *Lawrence,* 480 F.2d 688 (5 Cir. 1973) and *Kraft* v. *United States,* 238 F.2d 794 (8 Cir. 1956), by rejecting the "plain, clear and convincing" standard governing the admissibility of alleged "similar crime" proof. Moreover, although this Court in *Bronston* v. *United States,* 409 U.S. 352 (1973), held that a defendant could not be prosecuted for making a statement, which although misleading, was not literally

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* The decisions of the First, Fourth and Ninth Circuits to which reference is made are: *United States* v. *Leahey,* 434 F.2d 7 (1 Cir. 1970), *United States* v. *Heffner,* 420 F.2d 809 (4 Cir. 1969), and *United States* v. *Sourapas,* 515 F.2d 295 (9 Cir. 1975). This Court, on June 16, 1975, granted certiorari in *Beckwith* v. *United States,* No. 74-1243, in which the issue of the failure of the IRS to give taxpayers constitutional warnings is also raised. The *Beckwith* case, argued December 1, 1975, involved the question of whether *Miranda* warnings were constitutionally required in non-custodial interrogations by IRS agents. The instant case raises a different issue; namely, whether the IRS must comply with its published regulations governing the conduct of criminal tax investigations (requiring that specified warnings be given to taxpayers) as a matter of due process and equal protection. See *Yellin* v. *United States,* 374 U.S. 109 (1963). *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959), *Service* v. *Dulles,* 354 U.S. 363 (1957) and *U.S. ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954), which prohibit arbitrary deviations by agencies from published regulations and procedures. See also *U.S. ex rel. Donham* v. *Resor,* 436 F.2d 751 (2 Cir. 1971), *Smith* v. *Resor,* 406 F.2d 141 (2 Cir. 1969) and *Hammond* v. *Lenfast,* 398 F.2d 705 (2 Cir. 1968).

untrue, the decision below permitted a comparable statement to be used as "similar crime" proof relevant to wilfulness.

(4) Sanctioned prosecutorial misconduct of a particularly prejudicial nature in which the prosecutor improperly obstructed defense counsel's pretrial access to potential witnesses and concealed the fact that (in order to obtain the presence and testimony at trial of a foreign witness) the prosecutor had, through the improper use of a Letter Rogatory, threatened such witness with "arrest and extradition", despite the fact that the witness was innocent of any wrongdoing.

Opinions Below

The opinions of the Court of Appeals are not yet reported but are set forth in full in Appendix A and B at 1a-32a.*

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on August 28, 1975, and on November 18, 1975 the Court of Appeals denied Leonard's petition for rehearing and his suggestion for rehearing in banc (Appendix A and B at 1a-32a). On December 5, 1975, Mr. Justice Marshall extended Leonard's time for filing a Petition for Certiorari to and including January 17, 1976 (Appendix H at 57a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Should the IRS be required to comply with its own regulations governing the conduct of criminal tax fraud

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* References to sections of the Appendix are by capital letter, followed by the page number and the letter "a".

investigations, as the First, Fourth and Ninth Circuits have held?

2. Did the massive and unprecedented IRS mail watch (which intercepted all mail arriving from Switzerland at Kennedy Airport during two entire four month periods in 1968 and 1969) violate applicable Post Office regulations and the United States Constitution, and should evidence obtained as a result of the illegal mail watch be suppressed?

3. Should the standard of proof governing the admissibility of alleged "similar crime evidence" be "plain, clear and convincing" as the Fifth and Eighth Circuits have held (because of the highly prejudicial nature of such proof), or merely a "preponderance of the evidence" as the Second Circuit held below? Further, does this Court's decision in *Bronston* v. *United States, supra,* bar proof of wilfulness (through alleged "similar crime evidence") by means of an allegedly "false (but not literally untrue) statement" dictated by a government agent but signed by the defendant?

4. Did the prosecutor's misconduct in obstructing Leonard's access to prospective witnesses and in concealing from defendant's trial counsel that the Government, through the improper use of a Letter Rogatory, threatened a key foreign witness (who was innocent of any wrongdoing) with arrest and extradition in order to obtain the witness's presence and testimony at trial, deny Leonard a fair trial?

Statutes, Regulations and News Releases Involved

This case involves 26 U.S.C. § 7206(1), Part 861 of the Postal Manual of the Post Office Department, and IRS News Releases Nos. 897 (issued October 3, 1967) and 949 (issued November 26, 1968), the texts of which are set forth in pertinent part in Appendix D at 34a, E at 35a-44a, and G at 55a-56a.

Statement of the Case

Jackson D. Leonard was convicted on March 7, 1975, after a seven-day jury trial before United States District Judge Richard Owen of the Southern District of New York, on two counts of subscribing income tax returns for 1967 and 1968 which omitted income from reported adjusted gross income, in violation of 26 U.S.C. § 7206(1).*

Judge Owen sentenced Leonard to eighteen months imprisonment, but suspended execution of all but three months, and imposed the maximum fine of $10,000 ($5,000 on each count), plus the costs of prosecution. Execution of sentence has been stayed pending disposition of Leonard's Petition for a Writ of Certiorari.

The IRS Investigation of Leonard's Tax Affairs

The IRS investigation of Leonard's tax returns was precipitated by two independent events which occurred almost simultaneously. The first was that an undisclosed informant, who was seeking a reward, claimed that Leonard had been receiving commercial bribes, i.e., illegal kickbacks.** The second was that a mail watch conducted by the IRS led the IRS to suspect that Leonard had a secret Swiss bank account. As a result, Leonard's investigation

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* Leonard was not charged with tax evasion, a more serious violation. Compare 26 U.S.C. § 7201 with 26 U.S.C. 7206(1). The income which Leonard allegedly omitted from his adjusted gross income ("AGI") was $24,168.09 in 1967 and $58,684.42 in 1968. His reported AGI was $259,051.97 in 1967 and $134,276 in 1968. The allegedly omitted income was received by Leonard from Treadwell Corporation ("Treadwell"), pursuant to a contractual override between Union Carbide Corporation ("Union Carbide") and Leonard, providing that Leonard was to supervise engineering work done by Treadwell for a chemical plant in Louisiana designed by Leonard for Union Carbide.

** This allegation was later proved to be untrue.

was assigned to a highly unusual IRS program called the Foreign Bank Account Project ("FBA Project").

The Foreign Bank Account Project

The Foreign Bank Account Project, instituted in 1968, was a major, clandestine program to identify and prosecute American taxpayers who had dealings with Swiss banks.

The FBA Project was so highly secret that agents working on it were forbidden to discuss it even with other IRS personnel. A major aspect of the project was a mail watch conducted by Special Agents of the Intelligence Division* of the IRS who intercepted, inspected and photocopied mail coming into the United States from Switzerland.

In order to obtain authority for the mail watch, the IRS (under then current Post Office regulations, pertinent portions of which are set forth in Appendix E at 35a-44a) was required to represent in writing to the Post Office that the mail watch was part of a criminal investigation.

The mail watch involved an unprecedented effort by Special Agents of the IRS to intercept, handle and inspect all mail arriving at Kennedy Airport from Switzerland during two four month periods (January through April) of 1968 and 1969. Utilizing machines that microfilmed 3600 pieces of mail per hour, the IRS photocopied every envelope which lacked a return address, as the IRS sus-

* Special Agents work in the Intelligence Division of the Internal Revenue Service. They are the criminal investigators of the IRS and they have the right to carry guns and make arrests. *Revenue* Agents (as opposed to *Special* Agents) are simply auditors, i.e., accountants, whose responsibility is to conduct *civil* audits in order to determine the correct income tax liability of a taxpayer. Revenue Agents occasionally work with Special Agents on fraud cases, i.e., criminal investigations, but then only under the direction of Special Agents.

pected that the practice of Swiss banks was not to put their names or addresses on envelopes.* Since the microfilming took a few hours at least, and in some cases when the mail was heavy a second machine was brought in, the number of envelopes which the Special Agents photographed may have exceeded 100,000.

As a result of the mail watch, the tax returns of untold numbers of American citizens who the IRS suspected were receiving mail from Swiss banks were examined to determine which would be "good candidates" for audits. Selections were thereafter made of 110 of them in the New York area alone, without regard to the normal criteria for determining which taxpayers should be audited. Leonard was one of the taxpayers selected for special investigation.

The investigations of these 110 were supervised by Special Agent Hyman Boller who was assisted by a Revenue Agent named Bernard Morris. Investigators were specially picked from a select fraud group in the Audit Division and given detailed lists of specific things they were expected to look for in the audits. These items, which included telephone records, cable and telex charges and backs of checks, were not normally reviewed in civil tax examinations, and their selection reflected techniques employed in criminal investigations.

Revenue Agents, who were trained or supervised by Special Agents, conducted the FBA Project audits, gave no constitutional warnings, and deliberately concealed that they were conducting criminal investigations. While the audits were in progress, Special Agents continued the

* The IRS was able to identify envelopes sent by Swiss banks by comparing the postage meter numbers on the envelopes with the numbers on mail obtained by the IRS in response to earlier inquiries secretly sent to Swiss banks by IRS agents who pretended to be interested in opening Swiss acounts.

mail watches, and envelopes from Switzerland to taxpayers under investigation were intercepted, inspected and photocopied.

If the examination of the taxpayers' records failed to disclose independent proof of Swiss bank accounts, the Revenue Agents were instructed by Special Agents how to obtain incriminating admissions from the taxpayers.

Despite the fact that the IRS had documentary information that a taxpayer had contacts with a Swiss bank, the Revenue Agent was instructed to obtain a personal confrontation and utilize a subtle ploy by asking the taxpayer whether he had any *foreign* (rather than *Swiss*) accounts.* If he denied having any, the Revenue Agent was directed then to dictate, for the taxpayer's signature, an affidavit confirming the denial, apparently to commit the taxpayer in writing to a false denial that could be utilized in subsequent prosecutions either as direct evidence of criminal activity (making false statements to government agents in violation of 18 U.S.C. § 1001) or as circumstantial evidence of wilfulness (to be used in a subsequent prosecution for tax related violations as was done in the instant case).

The Audit and the Indictment

Leonard was informed that his returns had been selected for review by a standard audit notice sent to his home. It contained nothing to alert him of the criminal nature of the investigation.

The audit was begun in June or July, 1968 by Revenue Agent Mortimer Laski ("Laski") of the FBA Project. It

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* The Government conceded in its brief before the Court of Appeals below that the agents were specifically "instructed" to bypass the taxpayer's "accountants or attorneys" and "to directly ask the taxpayer" the foreign bank question. See page 17, fn., *infra*.

was six years before the investigation was completed, during which time at least eight, and possibly as many as seventeen, IRS agents dealt directly with Leonard or his representative.

The Swiss Bank Affidavit

In August 1969, during the course of the audit, Agent Laski, who did not inform Leonard of the criminal nature of the investigation, and did not give Leonard the warnings required by IRS regulations governing the conduct of criminal tax investigations, asked Leonard, outside the presence of his attorney and accountant, whether he had a Swiss bank account. According to Agent Laski, Leonard denied that he presently (in August 1969) had a foreign account.

Thereafter, at the direction of his IRS superiors, Laski dictated an affidavit which was substantially broader than Leonard's oral denial but which Leonard signed. It provided, *inter alia:*

(1) "I do not now and I have not had any foreign bank accounts"; and

(2) "I have not had any transactions or dealings of any nature with any foreign banks or other representatives except for [specified loans in Australia and currency conversions]."

The Government's "proof" of the affidavit's "falsity"

The Government offered the Laski-dictated, Swiss bank affidavit as "similar act" evidence relevant to "wilfulness".

The Government sought to prove the falsity of the affidavit through the testimony of Harris Egan, the manager of a branch office of Chase Manhattan Bank ("Chase"). He testified that between April and November of 1968 he

delivered to Leonard, at the request of Chase's International Office, a number of official Chase checks totalling $383,000, and that Chase had made these payments at the direction of a Swiss bank.*

Despite the fact that the Swiss bank affidavit did not purport to address itself to *indirect* transactions and despite the fact that the IRS drafted the affidavit and thereby determined the scope and content of Leonard's denial, the Government contended that the payments by Chase constituted "indirect" dealings with a foreign bank which Leonard should have disclosed. In the Government's view, this rendered the affidavit false and made it proper evidence of a similiar crime relevant to wilfulness.

Eva Brooke's testimony**

Eva Brooke, the widow of an employee of Kerr-McGee Chemical Corporation, testified that in the summer of 1971 (three years after the last tax-return year in the indictment and two years after Leonard had signed the affidavit) she was present when Leonard had business discussions with her late husband. According to Mrs. Brooke, "Mr. Leon-

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* This $383,000 was not alleged to be taxable income to Leonard nor was it alleged to have constituted any of the omitted income in either 1967 or 1968. As noted at p. 5 *supra*, the income alleged in the indictment to have been omitted was from Treadwell for engineering work performed on a chemical plant designed by Leonard for Union Carbide in Louisiana. The allegedly omitted income had no connection, direct or indirect, with any alleged Swiss bank.

** The Government improperly used a Letter Rogatory which it never filed in England, to coerce Mrs. Brooke, a British citizen, to travel to New York to testify upon a false representation and threat (contained in the Letter Rogatory itself) that she was otherwise subject in England to "extradition and arrest". Appendix F at 51a The Government concealed these circumstances from defense counsel at trial, and the facts did not become known until the appeal stage when the Government was required to file the Letter Rogatory as part of the record for transmission to the Court of Appeals for the Second Circuit. See Point IV, *infra*.

ard was extremely anxious that my husband join him in business" and as a result offered him:

> "A free apartment at Sutton Place, and he mentioned the sum of $100,000 a year, with my husband as president of the company, 50,000 of which would be made in U.S. dollars and 50,000 to be deposited into a Swiss bank account."

Mrs. Brooke also claimed that there was "a written note on this, but I did not see it myself." During the evening, Leonard and his wife and Mr. and Mrs. Brooke had gone to dinner and then for drinks. Mrs. Brooke stated that some time during that evening there was discussion as to how to open a Swiss bank account and Leonard said: "I have one."*

Mrs. Brooke also said she questioned Leonard about Swiss banks, and Leonard mentioned that "Swiss bank accounts are numbered and not in a name."

The Government claimed that Eva Brooke's testimony was evidence that Leonard had made a false statement in his 1971 federal income tax return when he checked the box that indicated that he did not personally have "any interest in or signature or other authority over a bank account in a foreign country."**

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* Since this conversation allegedly took place in 1971, it was not relevant to Leonard's Swiss bank affidavit, which was signed two years before.

** The 1971 tax return (containing the foreign bank account disavowal) was filed in April 1972, four and five years after the tax return years which were the subject of the indictment. Consequently, it was too remote to be relevant to whether Leonard wilfully subscribed his 1967 and 1968 tax returns knowing that they omitted material amounts, although it was clearly highly inflammatory and prejudicial. See Point III, page 23n., *infra*.

The Decision of the Court of Appeals for the Second Circuit

The Court of Appeals rejected Leonard's contentions that the IRS's investigation of him was criminal and that the mail watch was illegal, and held that Revenue Agent Laski (despite IRS regulations governing the conduct of criminal investigations) had no duty to advise Leonard that he was the subject of a criminal investigation nor to warn him of his rights to counsel or to refuse to answer Laski's questions.

While the Court of Appeals agreed with Leonard that the Government had failed to prove that Leonard's affidavit was false insofar as it related to whether Leonard personally had ever had any Swiss bank accounts, and while the Court of Appeals caustically noted (Appendix A at 25a-26a) that:

> "*It would doubtless have been wiser for the judge to have excluded the* [Swiss bank] *evidence* or, at the least, to have excluded it until after the presentation of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it. We do not think, however, that the trial judge's admission of this evidence was beyond the bounds of his legitimate discretion, although *it may have been close to the edge.*" (emphasis supplied) (citation omitted),

it nevertheless held that the jury might reasonably have inferred that Leonard had a *transaction* with a foreign bank since the "official" Chase checks Leonard received were predicated on instructions received by Chase from a Swiss bank.

The Court of Appeals reached this conclusion only because it applied a "mere preponderance" of the evidence standard for the admissibility of similar act proof (i.e., the affidavit) rather than using the "plain, clear and convincing" standard mandated by the Fifth and Eighth Circuits.

Although the Court of Appeals acknowledged that Leonard had raised issues of importance concerning how far the Government may go in discouraging witnesses from being interviewed by defense counsel, particularly when the witnesses are government employees, the Court of Appeals held that it did not need to reach those issues because it did not believe that Leonard had demonstrated that he had been prejudiced "in any significant degree" by the prosecutor's interference.

In fact, Leonard did prove prejudice: the information which the prosecutor refused to allow the prospective witnesses to supply him was the very data necessary to establish that the "audit" of Leonard was a criminal investigation from its inception. And this, of course, is the very thing the Court of Appeals held that Leonard had failed to do, and assigned as a principal reason for not suppressing the statements Leonard gave to Revenue Agent Laski. Further, the opinion also overlooked the fact that the prosecutor's misconduct itself prevented Leonard from demonstrating additional prejudice.

The decision below also failed to comprehend the import of the improper methods the Government used to get Mrs. Brooke to testify, which coercive methods undoubtedly affected the content of her testimony. Although the defense vigorously attacked the credibility of her testimony, it did so on the erroneous premise that her memory was simply wrong or that she was motivated by some unknown reason to hurt Mr. Leonard. Had the defense known that Mrs. Brooke's testimony had been procured and colored by threats of "arrest and extradition" and misrepresentations, it would have been able to challenge what must have been viewed by the jury as highly incriminating testimony. As an examination of the record will readily show, Mrs. Brooke's testimony had a significant adverse impact on Leonard.

Reasons for Granting Certiorari

I

This Court should resolve the conflict among the Circuits as to whether the IRS must comply with its own rules and give taxpayers suspected of criminal activities the constitutional warnings prescribed by IRS regulations.

The First Circuit (*United States* v. *Leahey*, 434 F.2d 7 [1 Cir. 1970], Fourth Circuit (*United States* v. *Heffner*, 420 F.2d 809 [4 Cir. 1969]) and the Ninth Circuit (*United States* v. *Sourapas*, 515 F.2d 295 [9 Cir. 1975]), have all unequivocally held that IRS agents must comply with the requirements of IRS News Releases 897 and 949.*

Although the Second Circuit (as is explained more fully below) clearly indicated its disagreement with the decisions of the First, Fourth and Ninth Circuits, it avoided a direct and explicit conflict by setting up a series of artificial distinctions between the facts in those cases and the instant one.

Thus the Court of Appeals has claimed that the IRS had not focused on Leonard as a criminal suspect at the time he was interviewed by Revenue Agent Laski and signed the allegedly false affidavit, and that Laski was a Revenue Agent, and not a Special Agent, and therefore not bound by regulations governing the manner in which criminal tax investigations should be conducted.

Contrary to the Court of Appeals' conclusion, however, the record clearly demonstrates that the IRS's investigation of Leonard was criminal from its inception. In the first place, under applicable Post Office regulations, to obtain Post Office authority for the mail watch the IRS was required to represent to the Chief Postal Inspector that the FBA Project was a criminal investigation.

* See Appendix E at 35a-44a for the text thereof, and *infra*.

The relevant sections of the regulations are Parts 861.41 and 861.42, which provide as follows:

> ".41 The Chief Postal Inspector is the principal officer of the Post Office Department in the administration of all matters governing mail covers. . . .
>
> ".42 The Chief Postal Inspector . . . may order mail covers [only] under the following circumstances:
>
> • • •
>
> "b. When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to . . . (3) obtain information *regarding the commission or attempted commission of a crime.*" (emphasis supplied) (Appendix E at 36a).

Indeed, the only basis on which the IRS could legitimately have obtained authority to conduct the mail watch was if it made an explicit representation that the information sought was necessary to an investigation "regarding the commission or attempted commission of a crime".*

* The Government contended both before the District Court and the Court of Appeals that the investigation of Leonard was strictly a civil audit and that the FBA Project, rather than being a criminal investigation, was merely a program to "develop audit techniques relevant to foreign bank accounts". In fact, the Government asserted in its brief below that "there is no inconsistency" between the previous "IRS representation to the Postal authorities" concerning the criminal nature of the FBA investigation and the Government's opposite claim asserted below that the investigation was civil. According to the government's brief before the Court of Appeals, these inherently inconsistent positions are reconcilable because the Government in the future intended to prosecute "other . . . [taxpayers] ultimately detected through the latter use of the

(*footnote continued on following page*)

Additionally, the origin of the investigation, the manner in which it was conducted and the functions actually performed by Agent Laski demonstrate that he was a part of a criminal investigation and not performing a strictly "civil audit".

The FBA Project originated in the Intelligence Division of the IRS, and initially only Special Agents took part in the mail watches. It was the Special Agents (who are criminal investigators) that utilized and compiled the master list of stamp meter numbers corresponding to particular Swiss banks and who produced the computer printout of taxpayers and the names of Swiss banks with which they corresponded. It was also Special Agents who initially wrote to such Swiss banks, falsely representing themselves to be American citizens interested in opening Swiss bank accounts. Further, it was Special Agent Hyman Boller who selected (with the assistance of Revenue Agent Morris) which taxpayers should be targeted for investigation.

(*footnote continued from preceding page*)

audit techniques developed by the FBA project" and that therefore the investigation was essentially civil. However, this argument would permit mail watches in every routine IRS audit on the theory that such audits might lead to criminal prosecution in the future. If this argument is correct, it would nullify the explicit limitations for mail watches contained in the Post Office regulations. See Part 861, *infra*, Appendix E at 37a.

Further, the Government cannot have it both ways. Either, as the IRS represented to the Post Office in 1967 or 1968, the FBA Project was a criminal investigation (in which case the IRS improperly failed to give Leonard the required warnings—*United States* v. *Leahey, supra, United States* v. *Heffner, supra, United States* v. *Sourapas, supra*), or the mail watch was part of a civil investigation (in which case the mail watch was improperly authorized since it was based upon a material representation now admitted by the Government to have been false—*Wong Sun* v. *United States*, 371 U.S. 471 (1963)). In either case, Leonard's statements should have been suppressed. *Leahey, supra, Heffner, supra, Wong Sun, supra.*

Special Agents also determined how the investigation should be conducted, and directed that its criminal nature should not be disclosed to the taxpayers. The obvious reason for such concealment was to induce unsuspecting taxpayers to cooperate with the "auditors". The IRS doubtless realized that cooperation was most unlikely once a taxpayer was advised he was a criminal suspect and thereafter sought and received legal counsel.

Use of Revenue Agents, rather than Special Agents, was clearly a part of the IRS's effort to conceal from the taxpayer the true nature of the investigation. As the Seventh Circuit stated in *United States* v. *Sicilia*, 475 F.2d 308, 310 (7 Cir. 1973), *cert. denied*, 414 U.S. 865 (1973):

> "In general, special agents are concerned with criminal investigations. On the other hand, the audit type of investigations are handled by revenue agents with no particular contemplation of criminal prosecution. There, therefore, is considerable potential for the taxpayer being misled as to the nature of the investigation."

Furthermore, Laski, though designated by the IRS as a "Revenue Agent", was acting as a "Special Agent" when he interrogated Leonard and secured his signature on the Swiss bank affidavit. Pursuant to instructions, Laski insited on a personal meeting with Leonard, conducted the interrogation as instructed by the Intelligence Division and inquired into an area that had no relation to the purely "civil" aspects of his audit.• As this Court

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• The Government lamely contended below in its brief to the Court of Appeals that the reason the agents conducting the investigations in the field were specifically "instructed" to bypass the taxpayer's "accountants or attorneys" and "to directly ask the taxpayer" the foreign bank question was because the taxpayer's representatives "may well have been given no knowledge of the existence of the Swiss account by the client." Of course, even if

(*footnote continued on following page*)

recognized in *Mathis* v. *United States*, 391 U.S. 1 (1968), it is the reality of the situation, rather than the nominal status of the IRS employee, that determines whether there is a requirement to give warnings.

Most importantly, there are additional critical indicia that the FBA project was a criminal investigation. During the alleged "audit" stage, Special Agent Boller selected a group of "20 odd" good candidates, who had orally denied having a foreign account and had also signed affidavits confirming the denial, and referred them to the U.S. Attorney's office for the Southern District of New York for questioning by Assistant United States Attorneys in the criminal division. The use of a federal prosecutor's office is completely inconsistent with the Government's claim below that the investigation was strictly civil. Further, IRS regulations limit mail covers only to criminal investigations; however, the mail watch of Leonard and others, run initially between January and April 1968, was continued in 1969, while the "audits" were still in progress to coincide with the personal confrontation with the taxpayer when the foreign bank question was to be asked. Additionally, the FBA investigation was "top secret" and was not disclosed, even to other IRS agents, except on a "need-to-know" basis. All of these are clearly characteristic of a criminal (not a civil) investigation.

(*footnote continued from preceding page*)

that were true, the "accountant or attorneys" could always have inquired of their clients and reported the information back to the agents. However, the fact that the agents in the project insisted on personal confrontations demonstrates that these meetings were designed to obtain either admissions or false denials.

Further, the insistence by a Revenue Agent that a taxpayer execute an affidavit is a rare occurrence in routine "audits"; only in alimony cases (i.e. where alimony is deductible by the husband) and in certain estate cases (where an accounting is required) are affidavits requested, but then the affidavits concern specific payments or items. Here, by contrast, the affidavit did not focus on any specific amounts but merely documented the taxpayer's oral denial, demonstrating that the Swiss bank affidavit here was designed to force an admission out of taxpayers who would "think twice", as IRS Agent Morris testified below, before signing a denial.

Consequently, this case is in fact indistinguishable from ***Heffner, Leahey*** and ***Sourapas, supra,*** and this Court should decide the important question of whether evidence obtained in violation of IRS regulations which are intended to protect the rights of citizens to due process should be excluded.*

II

This Court should decide whether the Swiss mail watch was legal.

The Court of Appeals decision that the IRS mail watch is legal raises issues of substantial national importance. At a time when there have been frequent revelations of unauthorized surveillance by government agencies, including the IRS, this Court should not allow to pass unreviewed a decision that sanctioned inspection of every piece of mail arriving in New York from Switzerland by air during a period of eight months, when there was not the slightest evidence that the people receiving the overwhelming bulk of this mail were connected in any way with any criminal activities. This is especially true since the number of individuals whose mail was microfilmed was substantial (perhaps exceeding 100,000), and also because the damage to privacy and freedom of speech and association that could result from such misuse of mail watches is considerable.

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* Moreover, as noted, at page 2, *supra*, this case raises a different question than *Beckwith, supra*, does, since agents there gave warnings which may have satisfied IRS regulations, while here no warnings at all were given until after Leonard had made his allegedly incriminating statements and turned over to the IRS substantial numbers of allegedly incriminating documents. Further, the opinion of the Court of Appeals for the District of Columbia does not indicate whether Beckwith raised the issue of non-compliance with IRS regulations, or only asserted that he had not been given full *Miranda* warnings.

This is the first case, as far as we can discover, which raises the question of whether the Government may institute broadscale mail watches of an entire class of people when it has no reason to believe that any specific member of the class has committed or is about to commit a crime.

Indeed, the mail watches which the courts have heretofore approved have all been quite limited in scope, and clearly restricted to the inspection of the mail sent to specific individuals who were reasonably suspected of having committed, or having attempted to commit, particular crimes. See, e.g. *Canaday* v. *United States,* 354 F.2d 849 (8 Cir. 1966), *United States* v. *Schwartz,* 283 F.2d 107 (3 Cir. 1960), *cert. denied,* 364 U.S. 942 (1961), *United States* v. *Costello,* 255 F.2d 876 (2 Cir. 1958), and *United States* v. *Isaacs,* 347 F. Supp. 743 (N.D. Ill. 1972).

The Second Circuit in effect has conceded that the FBA Project mail watch was of a very different order from earlier judicially approved mail watches, and raised greater risks of infringement of important constitutional rights, observing:

> "It may well be that, in these days of increased concern for the protection of privacy, the statement in *Costello* [*supra*] should not be read as an absolute, permitting, for example, the Government to copy the outside of any envelope received by every citizen." Appendix A at 15a.

The Second Circuit was nevertheless reluctant to hold the instant mail watch illegal, however, because it regarded the Leonard case as "an unattractive candidate for creating an exception" *Id.* at 15a, both because it did not regard the search as unreasonable or believe that addressees had a reasonable expectation that the outside of incoming international mail would not be inspected, and because it shared the concern of the IRS that Swiss bank accounts

were being used to evade the revenue laws and were undermining the public's confidence in the failure of the tax laws.

In support of its conclusion that the search was legal, the Court of Appeals cited the Bank Secrecy Act of 1970, 31 U.S.C. §§ 1101 and 1121 and this Court's decision in *California Bankers Association* v. *Shultz,* 416 U.S. 21 (1974), but overlooked entirely the fact that the Bank Secrecy Act was enacted subsequent to the mail watch challenged here and provided significant procedural safeguards that were wholly lacking in the FBA Project mail cover, and further that the Bank Secrecy Act's terms were public, while the mail cover was secret. A person who wished to maintain his privacy could avoid government surveillance of his financial dealings by not engaging in transactions which were reportable under the Bank Secrecy Act. No such protection could be achieved by the subject of the clandestine mail watch.

Moreover, this case is distinguishable from earlier mail watch cases in that heretofore the courts have always emphasized that the mail watches they were reviewing had not violated any laws.

Here, in marked contrast, the mail watch was not only extraordinarily broad, but it was also conducted in direct violation of the applicable Post Office regulations, which permitted mail watches only to protect the national security, to catch fugitives, or to assist in obtaining information concerning "the commission or attempted commission of a crime". (Parts 861.42b and 861.51b of the Post Office department, Appendix E at 36a and 37a.) Since the Government claimed both at trial and on appeal that the purpose of the FBA Project was simply to "develop audit techniques" concerning foreign bank accounts, and adamantly denied that the audit of Leonard was an outgrowth of a criminal investigation, it is clear that the Swiss mail watch does not come within any of the three recognized categories of cases

for which mail watches are authorized.* Such cavalier disregard of regulations designed to protect the privacy of the mail should not be condoned nor allowed to go unreviewed and uncriticized.

III

The Court should resolve the conflict among the Circuits governing the admissibility of similar act evidence, and should insure that its decision in *Bronston* v. *United States*, 409 U.S. 352 (1973) is not undermined.

The rule in the Second Circuit is that evidence of other crimes is admissible for any relevant purpose, including proof of wilfulness. *United States* v. *Deaton*, 381 F.2d 114 (2 Cir. 1967); *United States* v. *Crisona*, 416 F.2d 107 (2 Cir. 1969), *cert. denied* 397 U.S. 961 (1970). The majority of courts express their "other crimes" rule in an exclusory

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* The Second Circuit purported to find compliance with the aforecited Postal Regulations ". . . because IRS had reason to believe that crimes under the revenue laws were being committed by *some* taxpayers through the use of Swiss accounts" (emphasis supplied) (Appendix A at 21a). In so arguing, the Court of Appeals wholly ignored that the Post Office Regulations clearly were designed to limit mail watches to the mail of specific individuals suspected of committing specific crimes. See, e.g., Parts 861.42(a) and 861.51(a), which both speak of having reason to believe that the "subject or subjects" of the mail watch are violating postal regulations, Part 861.62, which prohibits copying of information on envelopes mailed between the mail cover "subject" and his known attorney-at-law, Part 861.64, which refers to mail covers ordered upon "subjects" engaged, or suspected to be engaged, in activities which jeopardize the national security, Part 861.66 which states:

> "Excepting fugitive cases [which of course concern specific known individuals], no mail cover shall remain in force when the *subject* has been indicted for any cause. If the *subject* is under investigation for further criminal violations, a new mail cover order must be requested . . ." (emphasis supplied),

and Part 861.74, which provides that the "subject" of a mail cover is entitled to discover any data relating to the mail cover. See Appendix E at 36a-38a.

form, that is, evidence of other crimes is not admissible except for certain purposes. See 2 Wigmore, *Evidence* §§ 300-373 for an analysis of specific crimes. See also *Michelson* v. *United States*, 335 U.S. 469, 475 (1948); *Spencer* v. *Texas*, 385 U.S. 554, 561 n. 7 (1967).

However, regardless of which formulation is used, such evidence is admissible only if its probative value outweighs its prejudicial effect, the prejudice being the danger that the jury is likely to conclude that because the defendant committed the similar crime, he is a "bad person" who deserves to be punished irrespective of whether the Government has proved beyond a reasonable doubt that he has committed the crime charged in the indictment. Indeed, for this reason, admission of alleged similar act proof carries with it a substantial potential for prejudice.*

In all Circuits, the question whether the probative value of such evidence outweighs the prejudicial effect is a matter, in the first instance, for the trial judge's discretion. However, the decision below created a conflict in the Circuits as to the applicable legal standard governing admissibilty.

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* In this case, the Government's evidence of alleged "similar crimes" dominated the trial. As a consequence, the focus of the trial shifted from the charges in the indictment (whether Leonard had wilfully subscribed tax returns which improperly omitted specific amounts) to the highly inflammatory and prejudicial allegation that Leonard had a secret Swiss account, which was wholly unrelated to the offenses charged in the indictment and specified in the Government's Bills of Particulars. The result was that in reality Leonard was tried and convicted of having a Swiss account, rather than of failing to include certain items in his adjusted gross income in his 1967 and 1968 tax returns. Only by reading the entire record, and in particular the prosecutor's opening and closing, is it possible to fully appreciate the extent to which Leonard's trial revolved around the question of whether he had a Swiss account.

Both the Fifth and Eighth Circuits have held that similar act evidence is admissible only if it is "plain, clear and convincing", *United States* v. *Lawrence*, 480 F.2d 688 (5 Cir. 1973), *Kraft* v. *United States*, 238 F.2d 794 (8 Cir. 1956). The Second Circuit, however, rejected that standard and held that it sufficed if the similar act were established by a mere preponderance of the evidence, presenting a clear conflict among the Circuits which should be resolved by this Court.

Moreover, the Second Circuit, in reaching its conclusion, totally disregarded this Court's holding in *Bronston* v. *United States*, 409 U.S. 352 (1973), that a literally true, albeit deliberately misleading statement, is not criminally false.

The "similar act evidence" which the Government (over Leonard's repeated objections) introduced to prove that Leonard wilfully signed his tax returns which omitted material amounts was the Swiss bank affidavit drafted by the Government and signed by Leonard in August 1969, in which Leonard denied that he ever had any foreign bank accounts or had any transactions or dealings (other than as described in the affidavit) with any foreign banks.

Although the Court of Appeals acknowledged that the Government had failed to prove that Leonard personally had a Swiss account in 1969, and although the Court of Appeals also conceded that there was no direct evidence that Leonard had any dealings or transactions with foreign banks, and admitted that it would have been wiser for the District Court to have excluded the foreign bank evidence entirely, it nevertheless held that the district court had not erred ("although it may have been close to the edge") in admitting the affidavit since there was sufficient circumstantial evidence for the jury, under a preponderance of the evidence standard, to have inferred that Leonard knew he was really dealing with a Swiss bank, although Chase, a domestic bank, delivered the checks to him.

While Leonard strenuously pointed out that the Government had failed to prove that the affidavit was literally false since the sole evidence it had introduced on that point was that he had dealings with Chase, the Second Circuit rejected this contention as "formal to an extreme".

Clearly, the standard used for determining the admissibility of similar act evidence was of critical importance. Even assuming, *arguendo*, that a jury could reasonably have concluded that Leonard had *indirect* transactions with a foreign bank, the evidence of such dealings (Chase's payments to Leonard at the direction of a Swiss bank) was not "plain, clear and convincing", and certainly not adequate to prove that the affidavit Leonard signed was literally false.

Leonard's transactions were directly with Chase, a domestic bank. The checks which Egan delivered to Leonard stated on their face only that they were "official" Chase checks. Indeed, Leonard's only contact was with an officer of a domestic bank.*

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* There was no testimony or documentary evidence that the $383,000 came from a personal account of Leonard and the Government offered no explanation as to the reasons for the payments. Indeed, as in *Bronston*, *supra*, the Swiss account could just as consistently have belonged to a corporation or a third party as to Leonard personally. As the record below demonstrates, Leonard had extensive dealings with foreign corporations in Europe. He designed chemical plants in Belgium, France, Italy and Germany. The transfers may well have been in relation to that work. Additionally, the affidavit itself revealed that Leonard made use of Australian banking facilities to secure a loan for a project in Australia and it is entirely possible that he was repaid by the Australian corporation through a Swiss bank.

Leonard, who elected to exercise his privilege not to testify, was under no obligation to prove the alternative explanations of the Swiss account evidence. It was the Government's burden to prove by at the very least, plain, clear and convincing evidence, that Leonard *personally* had a Swiss bank account or had "trans-

(*footnote continued on following page*)

If the Government had wanted Leonard to state he had never had any *indirect* dealings with a foreign bank, it could and should have so provided when it prepared the affidavit. If the Government failed to draft the affidavit carefully, it cannot blame the defendant. Consequently, Leonard's denial of transactions with a foreign bank does not constitute a criminally false statement any more than Bronston's implicit denial of ever having had a Swiss account did. *Bronston, supra.*

Therefore, this Court should exercise its jurisdiction both to resolve the conflict among the circuits over the proper standard for proof of similar acts, and to protect its decision in *Bronston, supra,* from evisceration.

IV

This Court should exercise its power of supervision of the federal administration of justice to condemn prosecutorial misconduct of a particularly prejudicial nature.

The prosecution obstructed Leonard's access to potential witnesses and failed to disclose to trial counsel that the Government had obtained the presence and testimony of a foreign witness, whose credibility was of critical importance to the Government's case, by improperly using a Letter Rogatory which falsely threatened the witness, who was completely innocent of any wrongdoing, with arrest and extradition.

(*footnote continued from preceding page*)

actions" with a Swiss bank. The Government failed to meet this burden.

> "It may well be that petitioner's answers were not guidelines but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard. . . . that any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." *Bronston* v. *United States, supra* at 362.

1. The Government improperly obstructed the defendant's interviews of prospective witnesses.

The Government repeatedly obstructed defendant's pretrial preparation by insisting on being present during all interviews of prospective Government witnesses and instructing them not to answer questions which were clearly relevant to matters covered in Leonard's indictment.

The question of how far the prosecution may go in directing witnesses not to be interviewed by defense counsel has received increasing attention since the decision in *Gregory* v. *United States,* 369 F.2d 185, 187-89 (D.C. Cir. 1966). Although this Court does not seem to have explicitly dealt with the issue, other courts and commentators have. *United States* v. *White,* 454 F.2d 435, 438-39 (7 Cir. 1971), *cert. denied,* 406 U.S. 962 (1972), *United States* v. *Matlock,* 491 F.2d 504, 506 (6 Cir. 1974), *cert. denied,* 419 U.S. 864 (1974); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, § 3.1(c); Discovery and Procedure before Trial, § 4.1; Kamisar, LaFave and Israel, Modern Criminal Procedure 1236-37 (1974 ed.).

All have taken the view that it is improper for the prosecutor to discourage prospective witnesses from being interviewed by defense counsel.

In the present case, the Government sought to discourage *all* interviews of prospective witnesses. For example, Leonard was denied the opportunity to question Revenue Agent Morris Laski, a key prosecution witness whose credibility was sharply in issue at the trial, either as to his contacts with the prosecutors or why, despite the total absence of any reference to a foreign account in Leonard's records (which the IRS had extensively audited), Laski, a Revenue Agent, had, for no apparent reason, asked Leonard whether he had a foreign bank account.

The prejudice Leonard suffered was substantial. At the time defendant's counsel interviewed Laski and sought to question him about the Swiss bank account affidavit, the defendant was not aware that this was an FBA Project case and further did not know that there had been a mail watch. Indeed, the prosecutor's instructions to the witnesses not to answer questions on this subject blocked, at an early and key point, discovery by Leonard of the massive mail watch and the relevant Post Office regulations and related IRS documents necessary for a full understanding of the mail watch.•

While it may be that the relevance of these inquiries related primarily to a suppression hearing on the legality of the mail watch, the fact remains that the Court of Appeals ruled that Leonard had not made a sufficient factual showing of prejudice. It is apparent, however, that the prosecutor's misconduct itself prevented the defendant from making a further showing of prejudice.••

• Discovery of all relevant facts and documents would have required production of the original letter from the IRS to the Post Office in late 1967 requesting authority for the mail watch. This document, containing the IRS's representation as to the criminal nature of the investigation, was never produced by the Government below. Indeed, the lower court's decision that the FBA investigation was not a criminal investigation and further that the mail watch was proper was based only on what the court *assumed* this letter contained. Leonard subpoenaed the IRS to produce all documents relevant to the mail watch, but the subpoena was quashed by the trial court.

Additionally, Post Office regulations governing mail covers were not published in the Code of Federal Regulations until March 11, 1975, four days after Leonard had been sentenced. 39 C.F.R. § 233.2. Consequently, Leonard, who had no knowledge of the existence of these regulations (and certainly no access either) was prejudiced by the prosecutor's obstruction of the interviews of the witnesses on the subject of the mail watch. Indeed, it was Leonard's appellate counsel who discovered the Post Office regulations by writing to the Post Office and requesting them under the Freedom of Information Act and then only after Leonard had been sentenced. See Appendix E at 35a.

•• Where the prosecutor's conduct violates a defendant's constitutional rights, the defendant need not establish prejudice, since the prosecutor's instructions to the witnesses not to cooperate themselves prevented the defendant from making such a showing. See *Gregory* v. *United States, supra.*

Thus, the defendant's access to essential information which might have led to possible legal defenses and witnesses was restricted and therefore his ability fully to prepare a defense improperly hampered.

2. The Government improperly used a Letter Rogatory to obtain the presence and testimony of Eva Brooke, a British citizen, upon the false threat that she was otherwise subject (in England) to "extradition and arrest" although she was completely innocent of any wrongdoing. In addition, the Government improperly failed to disclose these circumstances at trial, as required by this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963).

This Court, in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), held that:

> ". . . the suppression by the prosecution of evidence favorable to an accused upon request• violates due process where the evidence is material either to guilt or to punishment regardless of the good faith or bad faith of the prosecution."

During trial the government secretly and improperly conducted *ex parte* discussions with the court concerning a "Letter Rogatory [request] to the Appropriate Judicial Authority" in London, England, to compel Eva Brooke to travel from England to testify in New York at trial. Appendix F at 51a-55a.

A "letter rogatory" is a judicial request "addressed to a foreign court that a witness be examined within the latter's terri[torial] jurisdiction by written interrogatories, or, if the foreign law permits, by oral interrogatories." Ballentine's Law Dict. (3d ed. 1969) pp. 726-727. *Volkswagenwerk A. G.* v. *The Superior Court of Sacramento County*, 109 Cal. Rept. 219, 33 CA 3d 508 (1973). The purpose of a letter rogatory is simply to provide a means for

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• There was a pretrial request by Leonard for *Brady* material.

taking the testimony of a witness abroad. *United States* v. *Reagan*, 453 F.2d 165 (6 Cir. 1971), *cert. denied*, 406 U.S. 946 (1972).

Because a Letter Rogatory is a request from one nation to another for assistance in exercising the judicial power of the requesting nation, protocol requires, and 28 U.S.C. § 1781 provides, that a Letter Rogatory be transmitted to the judicial authority of the foreign nation. Since an order of a United States court requiring a person to give testimony has no extraterritorial effect, it is highly improper to seek, as the Government did herein, to directly serve a foreign citizen in a foreign nation, rather than to have the appropriate foreign judicial official effect service on the witness.

The Letter Rogatory in the instant case was both improperly served and used for an improper purpose. The Letter Rogatory stated that the court below had been informed by the Government that Eva Brooke, a British citizen, "presently residing in London at an address known to the United States Government" had admitted to "representatives of the United States" that "the defendant Leonard had made materially incriminating statements to her" but that "even though she was previously served with a subpoena requiring her attendance as a witness . . . in this present case, she . . . has *resisted* coming to New York . . . though the United States has agreed to bear all her reasonable travel expenses." (emphasis supplied). Appendix F at 52a-53a.

The court below thereafter requested in the Letter Rogatory (which was drafted by the Government) that the English court "enter an order" compelling her to travel to New York "as soon as physically possible" to testify at the trial. The Letter Rogatory further requested that the English court take "such other steps (such as *arrest* and *extradition*) that may be necessary in order to secure compliance with such orders" (emphasis supplied). Appendix F at 53a-54a.

The only English authorities explicitly relied on in support of this extraordinary request (compare 28 U.S.C. §§ 1781-1783, 1696), the Foreign Tribunals Evidence Act of 1856 and the Extradition Act of 1870, are completely irrelevant. The Foreign Tribunals Evidence Act of 1856 covers only civil matters and simply gives English courts the power to take testimony in England at the request of a foreign court. The Extradition Act of 1870 merely permits the taking of testimony for a criminal case pending in a foreign court in the same manner as provided by the Foreign Tribunal's Evidence Act of 1856.

In short, neither Act cited in the Letter Rogatory supported the request that Mrs. Brooke be arrested and extradited to testify in the United States. Indeed, both Acts establish that the request inherently lacked merit, which indicates that it was designed for a completely different purpose.

More particularly, there is no proof that the Government properly filed the Letter Rogatory in any English court. Indeed, it is apparent that the Government, fully aware of the improper request contained in the Letter Rogatory, never intended to seek the aid of an English court, but instead served it on Mrs. Brooke directly, realizing that she would not know it was improper and would be intimidated into abiding by its terms.*

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* As noted at p. 29, *infra*, the Government's contacts with the court on the Letter Rogatory were during the trial and were *ex parte* and concealed from Leonard until this appeal. The Letter Rogatory was signed by the court on January 14, 1975. Trial began January 13. When the existence of *ex parte* conferences accidentally came to Leonard's attention below, he specifically asked the trial Court whether he would learn what they were about and the court remarked that it "assume[d] at some point that may occur." However, Leonard's counsel never learned about them until after trial, after Leonard had been convicted and sentenced, and only when the Government filed the Letter Rogatory for the first time as part of the record on appeal. There was simply no legitimate prosecutorial or judicial reason for this *ex parte* procedure.

If this was indeed the case, then Leonard suffered substantial prejudice. The lengths the Government went to in order to obtain the presence of Mrs. Brooke in New York must have seriously concerned her, especially since she was recently widowed and therefore vulnerable. Indeed, despite the fact that she claimed to be an old friend of the Leonard family, she apparently was so intimidated by these events that she did not call Leonard when she arrived in New York to inform him, simply as a matter of courtesy, that she was to be a witness. This was hardly the normal reaction of a friend of 25 years who voluntarily said that the Leonards "have always been kind and friendly towards me".

The Government's extraordinary efforts to obtain her testimony also indicate how important Mrs. Brooke was as a witness, and her testimony was, in fact, extremely damaging to Leonard. It was, therefore, clearly significant that her presence as well as her testimony were colored by the Government's threat that she was subject to "arrest and extradition" even in England.

The Government's threat to arrest and extradite a key witness unless she testified in a manner desired by the Government was certainly the type of information which the Government should have disclosed to the defendant prior to or at trial. See *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Conduct of this sort is reprehensible, and this Court, in the exercise of its power of supervision of the federal administration of justice, should condemn it and insist that Leonard be given the opportunity of a new and fair trial.

CONCLUSION

For the foregoing reasons, this petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted

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Attorney for Petitioner
Jackson D. Leonard

ALAN KANZER
Of Counsel

APPENDIX

Appendix A, Opinion, United States Court of Appeals for the Second Circuit, August 28, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1176—September Term, 1974.

(Argued July 18, 1975 Decided August 28, 1975.)

Docket No. 75-1153

UNITED STATES OF AMERICA,

Appellee,

v.

JACKSON D. LEONARD,

Appellant.

Before:

MOORE, FRIENDLY and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard Owen, *Judge,* convicting Leonard, after a verdict, on two counts of an indictment charging him with violating 26 U.S.C. § 7206(1), by filing income tax returns for 1967 and 1968 which he did not believe to be true and correct with respect to his adjusted gross income.

Affirmed.

JAMES SCHREIBER, New York, N. Y. (Walter, Conston, Schurtman & Gumpel, P.C., New York, N. Y., and Alan Kanzer, of counsel), *for Appellant.*

Appendix A.

W. CULLEN MACDONALD, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, New York, N. Y., and John C. Sabetta, Assistant United States Attorney, of counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

Jackson D. Leonard, a successful New York chemical engineer, appeals from his conviction, after trial before Judge Owen and a jury in the District Court for the Southern District of New York, on two counts of an indictment charging him with violation of 26 U.S.C. § 7206 (1).[1] The first count charged the omission of $24,168.09 from Leonard's reported 1967 adjusted gross income of $259,051.97; the second count charged the omission of $58,684.42 from reported 1968 adjusted gross income of $134,276.00. He received a light sentence—concurrent terms of 18 months of imprisonment with 15 months suspended, fines of $5,000 on each count and the costs of prosecution.

I.

Of the many claims of error, only a few relate to the basic question of guilt. We shall deal with these in this section of the opinion. In that connection it will be neces-

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[1] This provides that:

Any person who—

(1) Declaration under penalties of perjury.—Wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

. . .

shall be guilty of a felony. . . .

Appendix A.

sary to summarize the evidence, which in view of the verdict we must do in the light most favorable to the Government.

On February 20, 1967, Leonard, "doing business under the name and style of the Leonard Process Company," a sole proprietorship, and Union Carbide Corporation (UCC) entered a contract for engineering services in connection with the construction of two chemical plants —a very large one in Taft, Louisiana, which was built, and a smaller one in South Charleston, West Virginia, which was not. Leonard's fees were to be of two sorts. One sort consisted of initial lump sum payments of $180,000 and later periodic payments of $37,000 each. The indictment did not charge that any such payments had been unreported. The other sort was a 10% override on UCC's reimbursements for amounts paid by Leonard to subcontractors performing detailed engineering services which his office was not equipped to provide. The Treadwell Corporation of New York became the subcontractor. None of these 10% overrides were reported as income for 1967 or 1968.

The general pattern which Leonard established was as follows: UCC would send him a single check covering the total amount owing for the subcontracted services including the 10% override, and in some cases also including the $37,000 periodic payment due to Leonard. Instead of depositing the UCC check in his bank account at First National City Bank (FNCB) and then paying Treadwell, Leonard endorsed the UCC check and sent it to Treadwell. Treadwell would then send Leonard one or two checks, as the case might be, one for the 10% override and another for the periodic payment due to Leonard when this had been included in the UCC check. While the return checks for the periodic payments found their way into bank accounts, as did other UCC checks not includ-

ing Treadwell payments, Leonard never deposited the checks representing the 10% override—$24,168.09 in 1967 and $58,684.42 in 1968. Instead he cashed them or used them to purchase travelers' checks.

So far as concerns his 1967 return, Leonard's claim is that the Government did not bear its burden of proving that the $24,168.09 of undeposited checks had not in fact been reported. The proof was this: Leonard's 1967 FNCB bank statements bear markings identifying certain deposits as UCC deposits, and others as coming from other jobs he was doing. Marion Bardes, who worked as a free-lance bookkeeper for Leonard accountants, testified that she had prepared a first draft of Leonard's 1967 tax return on the basis of these bank statements. The work papers for this draft return show that a figure of $291,000, as income from the UCC contract, was arrived at by adding the lump-sum payments and the periodic payments which had been deposited in 1967. This $291,000 was added to other Leonard income to make a total figure of $461,000 as gross income from Leonard's engineering activities. The figure of $461,000 was carried through each of the several drafts of Leonard's return and appeared as the "gross receipts" figure on Schedule C of the return that Leonard filed. That Schedule C showed a net profit of $256,873.95 which, when combined with a loss of $15,166.48 from his wife's Schedule C, yielded a profit of $241,707.47 which was entered on their Form 1040, as "Business income." That last figure was combined with miscellaneous other income of $17,344.50 to give an adjusted gross income figure of $259,051.94; it is this figure which Leonard is charged with having understated.

The defendant raises three objections: First, he claims there is no testimony to show that it was Leonard who identified the various income items on his bank statements as a basis for the preparation of his tax return.

Second, he claims there is no evidence that the missing $24,168.09 was not included as part of the other $170,000 of income (i.e., the difference between $291,000 and $461,000). Third, he stresses that Miss Bardes did not prepare the final return and contends that, since the government did not put the final preparer on the stand, the evidence is insufficient to connect the earlier draft forms with the return ultimately filed with the IRS.

All these were arguments for the jury, not for us. The jury was entitled to infer that Leonard had given the bank statements to the accountants for the purpose of preparing his return, knowing that the statements contained some but not all the UCC payments. The second point is frivolous; an exhibit shows the items that made up the other $170,000, and the Treadwell 10% payments were not among them. On the third point while the Government's case would have been stronger if it had called the person who prepared the final form and elicited that he had relied on the initial drafts, Miss Bardes' testimony showed that she had formulated the $461,000 figure that appeared on the final return, using bank records which Leonard knew did not contain the $24,168.09 of Treadwell checks he had cashed or used for buying travelers checks. In the absence of any contrary evidence, this was enough to permit the jury to infer that the $24,168.09 was not included on the final return, and that Leonard knew it was not included. If any further evidence of wilfulness were needed, it would be furnished by Leonard's clumsy attempt to delete the 10% override provision from the copy of the contract that was exhibited to Revenue Agent Laski in the course of the audit.

Leonard's argument about the 1968 return is quite different. Conceding that he directed that the 10% payments from Treadwell, and for that matter the $37,000 payments subsequent to January, not be included in his

1968 personal income tax return, he says they were not required to be. This result follows, he claims, because in January, 1968, he formed a corporation entitled The Leonard Process Co., Inc. (hereafter Leonard Inc.) to which he transferred the business of his sole proprietorship, The Leonard Process Company. On January 18, 1968, The Leonard Process Co., Index filed Form 2253, electing to have its income taxed directly to its shareholders as a small business corporation under Subchapter S of the Internal Revenue Code, for the taxable year beginning January 1, 1968. By letter of March 22, 1968, UCC agreed to an assignment of its contract from Leonard Process Company to Leonard Inc., effective February 1, 1968.[2] After February 1, 1968, Leonard deposited the $37,000 checks from UCC in a Leonard Inc. bank account. However, both before and after February 1st, he continued the practice of cashing the 10% checks from Treadwell—$6,229.20 for January and $52,455.22 for later months—although the checks after February 1 admittedly belonged to Leonard Inc. In response to the Government's contention that this simply meant that the checks were embezzled income reportable in the year of embezzlement, *James* v. *United States,* 366 U.S. 213 (1961), Leonard argues that, under this court's decision in *DiZenzo* v. *C.I.R.,* 348 F.2d 122 (2 Cir. 1965), they are to be treated rather as constructive dividends. Acceptance of this still does Leonard no good unless, as he asserts, Leonard Inc. had no earnings or

[2] Apparently use of the February 1st date was due to a belated recognition that unless Leonard Inc. had a fiscal year starting later than January 1, 1968, the benefit of using Subchapter S as a means for shoving income into 1969 would not be realized.

We give no weight to the Government's contentions that the assignment was invalid for want of consideration since Leonard remains personally liable, or that it was valid only from March 22, 1968. Whatever merit those contentions might have in litigation between the parties, and we doubt that they would have any, they are not open to the IRS. There is no claim that the assignment was a sham.

profits, IRC §§ 301(c), 316. He contends that it had none in the year beginning February 1, 1968, and that a properly instructed jury could find that the failure to include the $6,229.20 for January, 1968, was not material.

The Government introduced no evidence on the subject except to show that Leonard Inc. did not file a Subchapter S corporate tax return (Form 1120S) for 1968, 1969 or 1970. The defense offered an exhibit purporting to be a proposed corporate income tax return for the period February 1, 1968, to January 31, 1969, see note 2, showing a loss of $73,742.33. This form was subscribed by the accounting firm as preparer but bore no signature of any officer of Leonard Inc. The return was presented through a member of the accounting firm but without any testimony by any person who had prepared it; the judge admitted it only for the purpose of showing that such a return had been prepared but not as evidence of the truth of the matter asserted. The Government countered with another unfiled form showing a loss of only $29,017.77, for the year beginning February 1, 1968, which the judge admitted on the same limited basis. This latter form was of little weight since it was wholly unsigned and was marked "superceded."[3]

There is no doubt that if this had been a civil case, Leonard would have had the burden of showing "that the corporation did not have earnings and profits equal to the amount diverted," *DiZenzo* v. *C.I.R., supra,* 348 F.2d at 126-27, and that he would not have met it. But he contends he had no such burden under the rules governing the burden of proof in criminal prosecutions.

In prosecutions for income tax violations, production of a rather slight amount of evidence by the Government, here the proof of receipt of what are charitably character-

[3] Neither draft return included the cashed Treadwell checks as income.

ized as constructive dividends rather than embezzled funds, may transfer the burden of going forward to the defendant, see *Holland* v. *United States,* 348 U.S. 121, 137-39 (1954); *United States* v. *Vardine,* 305 F.2d 60, 63 (2 Cir. 1962). Although the ultimate burden of persuasion remains with the Government, Leonard did not introduce sufficient evidence of an absence of earnings or profits to warrant submission to the jury of a claim that, except for January 1968 income, the assignment of the UCC contract to Leonard Inc. constituted an absolute defense. An unfiled tax return, signed only by the accounting firm and unexplained by any preparer, has little probative weight; indeed, the defense's failure to call the preparer, whose testimony did not come under any privilege, could properly give rise to a negative inference as to whether Leonard Inc. had a loss. See 8 Wigmore, Evidence § 2273 (McNaughton rev. 1961). Moreover, the return introduced by the defendant was for the wrong year. Leonard Inc. had elected a tax year beginning January 1, 1968. The IRS Regulations are quite explicit that a Subchapter S corporation may change its tax year only with the prior approval of the Commissioner—Reg. 1.442-1(c)(4)—which is by no means routinely given—see Reg. 1.442-1(b)(1), especially examples ii and iii(a). See also 7 Mertens, Federal Income Taxation § 41B.21 (1967). The only issue on which Leonard was entitled to have the jury consider the assignment, and the unfiled return, was that of wilfulness, and it was clearly permissible for the jury to find that this evidence did not negate the other evidence bearing on that point.

The only remaining point on this phase of the case is Leonard's contention concerning the charge. Trial counsel for Leonard had submitted a request to charge in regard to Leonard Inc., which sounded in terms of an abso-

lute defense to Count Two rather than as bearing only upon wilfulness. Before instructing the jury, the judge informed counsel that he would not give the requested charge. The judge said nothing specific about the defendant's contention relating to Leonard Inc., relying rather on his general remarks about wilfulness and burden of proof. After the charge Leonard's counsel excepted generally to the failure to give requested charges; he also asked that since the judge had outlined some of the Government's contentions, he should also outline the defendant's. The court agreed to do this and mentioned several defense contentions, not including the one about Leonard Inc. Counsel expressed no further objections.

The requested charge suffered from the usual defect of asking more than was deserved. For reasons already indicated, the judge was not required to, indeed could not correctly, charge that "[T]he proof in this case shows that in the first year of operation, the corporation sustained a loss of approximately $73,000." Neither was Leonard entitled to have the jury instructed "as a matter of law that the checks addressed to The Leonard Process Co., Inc., from the period February 1968 through November 1968 are returns of capital and are not taxable;" there was no evidence that this was so. Although lawyers seem never to learn the lesson, it is elementary that to put a trial court in error for declining to grant a requested charge, the proffered instructions must be accurate in every respect. *Southern Ry. Co.* v. *Jones,* 228 F.2d 203, 213 (6 Cir. 1955); *Shaw* v. *Lauritzen,* 428 F.2d 247, 250 (3 Cir. 1970). The most to which Leonard was entitled was a charge that if the jury found he believed both that the undeposited checks beginning in February 1968 were the property of Leonard Inc., and that Leonard Inc. had no earnings or profits, the jury could find a lack of wilfulness in failing to report these payments in

his personal income tax return. We have no reason to think that if counsel had requested such a charge, the judge would have refused to give it.

II.

As so often happens, the prosecutor chose to imperil a good case by introducing a line of evidence that added little but was bound to be a prolific breeder of substantial claims of error—to which the remainder of this opinion must be devoted.

In order to provide a basis for understanding these claims, we must back up a bit; if the reader wonders what all this will have to do with Leonard's case, we must crave indulgence.

The New York Regional Office of the IRS had become concerned over possible losses of United States income taxes through the use of secret Swiss bank accounts. It occurred to someone that taxpayers having such accounts might be identified by their receipt of statements from the banks. However, detection was impeded by the fact that, in the interest of secrecy, the Swiss banks used envelopes not bearing the banks' names or return addresses. Some agents penetrated this shield by writing various Swiss banks about establishing accounts and observing the postal meter numbers on the answers. Armed with these numbers, IRS requested the Postal Service, in a communication not in the record, for permission to conduct a mail cover during the first four months of 1969. On the evenings of about 60 days during that period, a Postal Inspector and IRS Special Agents, working at the main New York City Post Office, photostated with high speed copiers the faces of all air mail envelopes without return addresses, mailed from Switzerland to New York.[4]

[4] Two machine were employed each with a capacity of 3,600 envelopes per hour. The sorting and copying process usually took only half an hour. The evidence was that delivery of the mail was not delayed since the mail arrived late in the afternoon or early in the evening and sorting for delivery would not begin until the next morning in any event.

Thereafter postage meter numbers on these photostats were examined to see if any matched those known to have been used by Swiss banks. This group, which amounted to thousands of envelopes, was converted into a print-out containing the recipients' names, addresses, dates of envelopes and the identities of the banks. From the several hundred names in the print-out, B. H. Morris, a Senior Regional Analyst in the office of the Assistant Regional Commissioner of Audit, and Special Agent Boller selected a group of 100 in the Manhattan and about 50 in the Brooklyn District. Leonard, whose name appeared in the larger sample and whose return had already been selected for audit because of a development described below, was added to the list, along with a few others similarly situated. In 1969 the procedure was repeated. All this was known as the Foreign Bank Account (FBA) Project.

We now turn to another development. In early 1968 the IRS had received an informer's report that Leonard had been getting kickbacks from a subcontractor. Although the report came originally to the Intelligence Division, which handles criminal investigations, it was referred, in accordance with usual procedures, to the Audit Division, which it reached on April 16, 1968. On June 7th the Manhattan District Director advised Leonard that his 1966 personal income tax return had been assigned for examination to revenue agent Rothstein.

Rothstein was not one of the special group of revenue agents who had been selected to pursue investigations emanating from the FBA project. On August 7, 1968, Leonard's audit was reassigned to revenue agent Mortimer Laski. In accordance with normal procedures, Laski also

audited Leonard's 1965 return and, when the ordinary post-filing processing was completed, the 1967 return.

The audit began in normal fashion with an examination of Leonard's papers—including the UCC contract with the 10% override provision deleted by a hand inked line—at the office of his accountant. Sometime early in 1969, Laski met Leonard at the accountant's office. Laski did not advise Leonard of his right to refrain from answering incriminating questions or to have counsel. Laski inquired about the UCC payments; Leonard claimed that the provisions of the contract relating to the $37,000 monthly payments, and the 10% overrides, had been changed. When asked, in accordance with prescribed procedures in FBA investigations, whether he had foreign bank accounts, Leonard said he had none except for one in an Australian bank. Again in accordance with prescribed FBA procedures, Laski furnished Leonard's accountant a proposed affidavit which Leonard executed on August 27, 1969; we reproduce this in the margin.[5] Agent Laski then continued his audit, particularly requesting more information from UCC. On the basis of this, Agent Laski and a successor revenue agent, on June 30, 1970, submitted a report recommending that the matter should be referred to the Intelligence Division for a fraud investigation. The recommendation was accepted, and a criminal investigation was begun with a Special Agent in charge. Thereafter Leonard was given warnings of his constitutional rights at the beginning of each interview.

[5] JACKSON D. LEONARD, being duly sworn, deposes and says:

1. I make the following statements in connection with the examination of my U.S. Income Tax Returns for the years 1965, 1966 and 1967.

2. I do not now have and I have not had any foreign bank accounts. I have not had any transactions or dealings of any nature with any foreign banks or other representatives except for the following:

(a) Nominal currency conversions for living expenses while I was travelling.

(b) In 1968 I made use of Australian banking facilities to secure a loan which is directly related to an engineering project which I have completed in Australia.

We can now satisfy the curiosity of anyone who has persisted in reading so far as to what these events had to do with the case. The Government sought to prove that the statements in the affidavits that Leonard had no foreign bank accounts and had no dealings with foreign banks, with two exceptions, were false. This was not for the purpose of showing that any of the unreported UCC payments got into foreign bank accounts but simply to bolster the proof that the omissions of the 10% override payments from Leonard's 1967 and 1968 income tax returns were wilful.

The evidence was of two sorts: Harris Egan, an official at the Chase Manhattan Bank (CMB) branch on United Nations Plaza, near Leonard's apartment, testified that in April, 1968, he delivered to Leonard's apartment three official CMB checks—two checks for $20,000 and $25,000 dated April 12th and a $120,000 check dated April 26th. Three other official CMB checks for $64,000, $16,000 and $138,000 were delivered to Leonard later in the year. In all, the checks totaled $383,000. All six checks were payable to Leonard on remittance instructions issued by Banque Cantonale de Zurich. Leonard used most of the checks to pay off a personal FNCB loan.

Eva Brooke testified that in the summer of 1971, in the course of an endeavor to hire her now deceased husband, Jack Brooke, away from his then employer, Kerr-McGee Chemical Corporation, Leonard offered Brooke $100,000 a year, half to be paid in dollars and the other half to be deposited in a Swiss bank account. Later, in answer to an inquiry from Brooke, Leonard admitted to having such an account. Since this admission in 1971 was not necessarily

inconsistent with the affidavit executed in August 1969, the Government also put in evidence Leonard's 1971 income tax return, executed April 10, 1972, which contained the following question and answer:

> Did you, at any time during the taxable year, have any interest in or signature or other authority over a bank, securities, or other financial account in a foreign country (except in a U.S. military banking facility operated by a U.S. financial institution)?
> [Answer:] No.

Now for the flood of objections which the admission of this evidence has precipitated.

(1) The broadest in scope is that the mail cover was an unreasonable search in violation of the Fourth Amendment; that the interrogation of Leonard about foreign bank accounts and the execution of the affidavit resulted from it; and that any false statement in the affidavit was, thus, the fruit of a poisonous tree.

It has been settled since *Ex parte Jackson,* 96 U.S. 727 (1878), that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" protects against a warrantless opening of sealed letters and packages, save insofar as may be needed in the case of incoming international mail for the enforcement of the customs laws. See *United States* v. *Odland,* 502 F.2d 148 (7 Cir.), *cert. denied* 419 U.S. 1088 (1974), and cases there cited. However, this court said in *United States* v. *Costello,* 255 F.2d 876, 881 (2 Cir. 1958):

> We think the Jackson case necessarily implies that without offense to the Constitution or statute writing appearing on the outside of envelopes may be read and used.

Leonard counters by saying that "the mail watches which the courts have heretofore approved have all been quite limited in scope, and clearly restricted to the inspection of the mail sent to specific individuals who were reasonably suspected of having committed, or having attempted to commit, particular crimes."

It may well be that, in these days of increased concern for the protection of privacy, the statement in *Costello* should not be read as an absolute, permitting, for example, the Government to copy the outside of every envelope received by every citizen. But this case is an unattractive candidate for creating an exception. The IRS was confronted with a serious problem in the use of Swiss bank accounts to evade the revenue laws. Not too long after the mail covers here at issue, the House Report on the Bank Secrecy Act of 1970, quoted in *California Bankers Ass'n* v. *Shultz,* 416 U.S. 21, 28-29 (1974), was to state:

> One of the most damaging effects of an American's use of secret foreign financial facilities is the undermining of the fairness of our tax laws.

and

> The former U.S. Attorney for the Southern District of New York has characterized the secret foreign bank account as the largest single tax loophole permitted by American law.

In 1968 and 1969 the IRS did not have the assistance now provided by the reporting requirements of Title II of the Bank Secrecy Act, 31 U.S.C. §§ 1101, 1121. Even if we assume that copying the outside of letters may in some circumstances be a "search," the 1968-1969 project improvised by the IRS did not involve an unreasonable one; indeed it involved less in the way of disclosure than the

foreign reporting requirements which the Supreme Court has sustained in the *California Bankers Association* case, *supra,* 415 U.S. at 59-63. Moreover, if the test for applicability of the Fourth Amendment is a "reasonable expectation of privacy," *Katz* v. *United States,* 389 U.S. 347, 360 (1967) (concurring opinion of Mr. Justice Harlan), it is difficult to see how there can be any such reasonable expectation with respect to the outsides of incoming international mails which are subject to inspection and even in some cases to opening in aid of the enforcement of the customs laws.

(2) A second attack against the mail cover is that it could not have been lawfully authorized under the applicable Postal Regulation. The Postal Manual then in effect provided in § 861.42,[6]

> .42 The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:
>
> • • • • •
>
> b. When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (1) protect the national security, (2) locate a fugitive, or (3) obtain information regarding the commission or attempted commission of a crime.

Leonard argues that § 861.42b(3), the only provision that can be applicable, requires that the agency seeking permission must be engaged in the investigation of a specific crime which it has reason to think has been committed, or is about to be. Apart from the fact that the objection

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[6] The applicable mail cover regulations have now been republished, with some changes, in the Federal Register. 40 Fed. Reg. 11579 (1975), *to be codified as* 39 C.F.R. § 233.2(e).

was not made below, we see no reason to read the regulation so narrowly. Apparently the Postal Service did not, and its interpretation of its internal regulations is entitled to weight. See 4 Davis, Administrative Law Treatise, § 30.12 at 261 & n.12 (1958).

(3) The objection most strongly pressed is this:

Although this circuit and a majority of the others have held that *Miranda* v. *Arizona,* 384 U.S. 436 (1966) does not require the IRS to give the *Miranda* warnings to taxpayers not in custody, even in criminal tax fraud investigations, IRS has gone beyond its constitutional obligation. In Internal Revenue Service News Release No. 897, issued October 3, 1967, it stated, so far as here pertinent:

> "In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.
>
> "Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.
>
> "Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.
>
> "On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'"
>
> . . .

Appendix A.

In News Release No. 949, issue November 26, 1968, it further provided:

> "One function of a Special Agent is to investigate possible criminal violations of Internal Revenue laws. At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding."

Three circuits have held that when a special agent has failed to give the advice described in these Releases, incriminating statements by the taxpayer will be suppressed. *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1969) (one judge dissenting); *United States* v. *Leahey,* 434 F.2d 7 (1 Cir. 1970); *United States* v. *Sourapas,* 515 F.2d 295 (9 Cir. 1975).

Leonard cites various reasons why the audit must be considered as having been one "of suspected criminal tax fraud" from the outset even though it was conducted by a revenue agent and not by a special agent. These include the fact that the mail cover could be justified under the Postal Regulations only if its purpose was to "obtain information regarding the commission or attempted commission of a crime"; that special agents participated in the mail cover and in framing the instructions for the audits of the persons selected as a result; and that persons who are the subject of ordinary audits are not asked to sign affidavits as Leonard was.[7]

[7] The defendant also claims that he was the subject of a criminal investigation quite apart from the FBA project, since IRS

Appendix A.

We are not at all sure that we would follow the *Heffner—Leahey—Sourapas* doctrine in the case of an occasional and undeliberate departure from the procedure described in the News Releases if the issue were squarely before us. It is, of course, well established that when agency action "is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed." *Vitarelli* v. *Seaton,* 359 U.S. 535, 546-47 (1959) (concurring opinion of Mr. Justice Frankfurter). However, *Vitarelli* and almost all of the great number of cases that have applied the doctrine have concerned the validity of the agency's own action in the face of a violation of its own regulations, see Note, Violations by Agencies of Their Own Regulations, 87 Harv. L.Rev. 629 (1974), rather than an invocation of the exclusionary rule. The latter, as Judge Clary said in a perceptive but seemingly neglected opinion many years ago, "represents an attempted accommodation of competing values." *United States* v. *Schwartz,* 176 F.Supp. 613, 615 (E.D.Pa. 1959), aff'd on other grounds, 283 F.2d 107 (3 Cir. 1960), *cert. denied* 364 U.S. 942 (1961). Judge Clary thought that, while this accommodation required exclusion when the Constitution or a statute had been violated, the balance turned the other way when an official of an agency had simply violated the agency's own regulation—something which the agency would presumably be interested in correcting for the future, as it might not be when the Constitution or a statute imposed distasteful requirements upon it. Despite persuasive contrary arguments in

action was precipitated by an informer's tip made in the first instance to the Intelligence Division. We do not think that this fact, by itself, makes the Audit Division's work subject to the News Releases; despite defense counsel's earnest efforts to distinguish the case, we find the reasoning of *United States* v. *Robson,* 477 F.2d 13, 16-17 (9 Cir. 1973), *cert. denied* 420 U.S. 927 (1975), persuasive on this point.

Appendix A.

Judge Coffin's opinion in *United States* v. *Leahey, supra,* a period of increasing disenchantment with the exclusionary rule, see *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 412-18 (1971) (dissenting opinion of the Chief Justice); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 266-69 (1973) (concurring opinion of Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist); see also *United States* v. *Burke,* —— F.2d ——, —— (2 Cir. 1975), slip opinions 3571, 3588-90, would not seem to be a good time for us to embrace a rule that when an agency voluntarily publishes a press release announcing that it will extend to suspects more procedural protection than the Constitution or a statute demands, any violation, however unintentional or excusable, will lead to suppression.

We find it unnecessary, however, to decide whether we would follow the cited cases. For even if we were persuaded by them, we would not reach the result urged by Leonard.

In the first place, we read the News Releases as outlining the instructions which the IRS has given to Special Agents, something that Agent Laski was not. Leonard's position thus must be that exclusion is required not only when a Special Agent fails to observe his instructions but also when IRS, mistakenly believing that the investigation has not yet become one "of suspected criminal tax fraud," does not assign a Special Agent to conduct it, or at least fails to instruct an ordinary revenue agent to act as if he were a special agent. We think this goes beyond the bounds of good sense interpretation. A different case would be presented if IRS consistently assigned ordinary revenue agents to conduct what it knew to be criminal investigations and they failed to give the warnings indicated in the News Releases, but there is no evidence of this.

Second, we do not think the investigation had become one "of suspected criminal tax fraud" when Leonard

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executed the affidavit on August 27, 1969. To borrow Mr. Justice Frankfurter's phrase, *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 493 (1951), "we do not find ourselves pinioned between the horns of [counsel's] dilemma" that unless the mail cover was to unearth crime it was illegal under the Postal Regulations, and that if it was legal, the tax investigation of Leonard was criminal. The mail cover came within the Postal Regulations because IRS had reason to believe that crimes under the revenue laws were being committed by some taxpayers through the use of Swiss bank accounts. It does not follow that every person whose name turned up in the print-out as probably having a Swiss bank account was suspected of committing such a crime. In fact the audit disclosed no sufficient evidence that Leonard had committed a crime by having a Swiss bank account. What ultimately led Agent Laski to recommend a criminal investigation was the data furnished by UCC, which showed, not a "kick-back" as represented by the informer, but a failure to report the 10% overrides which Leonard had received.

(4) Citing *Bronston* v. *United States,* 409 U.S. 352 (1973), Leonard next claims that the Government did not produce sufficient proof of the falsity of his affidavit, see note 5, to justify its admission into evidence. The prosecution did not offer evidence from the mail cover showing that Leonard had received communications from the People's Bank in Switzerland, although, as will be seen, the defendant elicited some evidence that at least hinted as to his having a Swiss account; the Government relied rather on the testimony of the CMB branch manager described above and, to a lesser degree, on that of Mrs. Brooke. Leonard claims that the manager's testimony did not show that Leonard personally had any Swiss bank accounts, since the numbered account at the Banque Can-

tonale de Zurich whence the remittance to CMB was made, might have belonged to a corporation owned by him or even to an outsider, and that Mrs. Brooke's testimony to an admission in the summer of 1971 does not sufficiently show falsity in an affidavit made in the spring of 1969. We think that this contention is valid and that if Leonard's trial counsel had requested an instruction that the jury could not find this portion of the affidavit to be false, he would have been entitled to it. However, no such request was made and the defendant is thus forced to show also that there was no falsity in the denial of "any transactions or dealings *of any nature* with any foreign banks or other representatives" (emphasis supplied). He argues that the transactions to which the CMB manager testified were between Leonard and CMB, and that therefore there is no falsity. That argument, however, seems formal to an extreme; it is more reasonable to say that in fact Leonard had had such dealings with a Swiss bank, and that CMB had simply been a conduit for transmission of the funds from the Banque Cantonale de Zurich. The real question is whether there was sufficient proof that Leonard knew that the money had come from a foreign bank. Since the money came from a Swiss numbered account, it is understandable that there was no direct evidence on this point; under a preponderance of the evidence standard, there was enough circumstantial evidence to entitle the jury to draw the required inference. In addition to the practical point stressed by the trial judge, that Leonard probably had a pretty fair general idea of how $383,000 was being transmitted to him, the jury could also consider the fact that Leonard had no account at CMB, the peculiar method chosen to deliver the CMB official checks to him, and the pains taken by Leonard to keep them out of his FNCB account.

Leonard further argues that the preponderance standard is not high enough for "similar act" evidence and points to statements that such evidence must be "plain, clear and conclusive" to be admissible. *Kraft* v. *United States,* 238 F.2d 794, 802 (8 Cir. 1956); *United States* v. *Broadway,* 477 F.2d 991, 995 (5 Cir. 1973). This view appears to rest on a misconception. Similar act evidence is admitted to show wilfulness and for other purposes, not because it may indicate the commission of crime but in spite of that. 2 Wigmore, Evidence § 305 (3d ed. 1940). Insufficiency of the evidence to support submission to the jury of an indictment charging that the August, 1969, affidavit was a false statement in violation of 18 U.S.C. § 1001, does not mean that the evidence could not be received to prove wilfulness with respect to a different crime if other evidentiary rules were satisfied. While "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship,* 397 U.S. 358, 364 (1970), the "fact" here is wilfulness, not each subsidiary fact offered to establish it. *United States* v. *Taylor,* 464 F.2d 240, 244 (2 Cir. 1972), compare *Lego* v. *Twomey,* 404 U.S. 477 (1972). A preponderance standard is sufficient for such facts if the aggregate of the evidence on the issue of wilfulness meets the *Winship* requirement, as it plainly does here.

(5) Leonard also claims that the whole line of proof regarding Swiss banks and statements he made about them should have been excluded on the basis that the small probative value of the evidence was outweighed by its prejudicial potential. *United States* v. *Deaton,* 381 F.2d 114 (2 Cir. 1967); Fed. Rules Evid. Rule 403. The probative value of similar acts used to prove wilfulness or intent is dependent on the existence of a close parallel between the

crime charged and the acts shown, 2 Wigmore, Evidence § 302 at 200-01 (3 ed. 1940). The crime here charged is the wilful subscribing of a false document under I.R.C. § 7206 (1), a section of the Code which, both in its language, see note 1, and in its history, makes knowing falsity the gravamen of the offense. *Kolashi* v. *United States,* 362 F.2d 847, 848 (5 Cir. 1966); 10 Mertens, Federal Income Taxation § 55A.13 at 65-69 (1970). If the jury, crediting the testimony that was offered, found that the 1969 affidavit and the statement on the 1971 tax return were false, they could properly use that conclusion to help them "in determining whether the defendant had a wilful intent to sign here a false return," as the trial judge charged. Although the fit between the similar acts and the crime for which Leonard was convicted is not so close as it has been in cases where identical forms for immediately preceding years have been introduced, e.g., *United States* v. *Coblentz,* 453 F.2d 503 (2 Cir.), *cert. denied* 406 U.S. 917 (1972), it is within the bounds established by some of the decided cases, e.g., our own *United States* v. *Kaufman,* 453 F.2d 306 (2d Cir. 1971).[8]

There remains, however, the question whether the value of the evidence is "worth what it costs." McCormick, Evidence § 185 at 438 (2 ed. 1972). It is true that transacting business with Swiss banks, or lying about not having done so, is rather more likely to "arouse the irrational passions of the jury" than was evidence of the claiming of an improper deduction in an income tax return in *United States* v. *Kaufman, supra.* At the same time, we think that the defendant has overstated the case in claiming that this line

[8] The Government's brief chides Leonard for having "utterly failed even to inform this Court of the District Court's stated, independent ground of admissibility—that both the 1969 affidavit and the 1971 return are false exculpatory statements—and of the authorities supporting that ground, which were cited and relied upon below." We agree with counsel for Leonard that this claim is frivolous and that the cases are not in point.

of proof was "highly inflammatory." The evidence was hardly the equivalent of a bloody shirt, compare *State* v. *Goebel,* 36 Wash. 2d 367, 379, 218 P.2d 300, 306 (1950), a dying accusation of poisoning, *Shepard* v. *United States,* 290 U.S. 96, 104 (1933), or a claim of homosexuality, *United States* v. *Provo,* 215 F.2d 531, 537 (2 Cir. 1954). Moreover, defendant's counsel at trial must not have considered it to be that damaging, for he was willing to bring out additional allegations of foreign bank connections if they could be used for his own purposes. The prosecution did not introduce evidence that Leonard had been identified for investigation as part of the FBA project and indeed, objected to the introduction of that information. Nevertheless defense counsel went into the matter, apparently attempting to show, as he later argued to the jury, that Leonard was the victim of a bureaucratic steam-roller. Indeed, our impression is that in fact the defense welcomed the Government's resort to similar act testimony since this tended to distract the jury from an issue on which the prosecution's case was exceedingly strong to one on which it was considerably weaker, and also offered abundant opportunities for objection and possible reversal.

In any case, the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain. We said in *United States* v. *Ravich,* 421 F.2d 1196, 1203-04 (2 Cir.), *cert. denied,* 400 U.S. 834 (1970), citing *Cotton* v. *United States,* 361 F.2d 673, 676 (8 Cir. 1966), and *Wangrow* v. *United States,* 399 F.2d 106, 115 (8 Cir.), *cert. denied* 393 U.S. 933 (1968), that "his determination will rarely be reversed on appeal." It would doubtless have been wiser for the judge to have excluded the evidence or, at the least, to have excluded it until after the presentation

of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it. Cf. *United States* v. *Kaufman, supra,* 453 F.2d at 311. We do not think, however, that the trial judge's admission of this evidence was beyond the bounds of his legitimate discretion, although it may have been close to the edge.

(6) Even this does not exhaust the claims of error arising from the course adopted by the prosecutor. Defendant raises a number of other points, with which we must deal more briefly.

(a) Relying on *United States* v. *Baum,* 482 F.2d 1325, 1331-32 (2 Cir. 1973), Leonard claims to have been the victim of unfair surprise with respect to the "similar act" evidence. *Baum* differs in several respects: The trial court had erroneously denied a request that would have disclosed the name of the surprise witness, Greenhalgh, *id.* at 1329, 1331, and had refused any continuance at all when he was called, *id.* at 1330. Here Leonard's counsel was on notice as to the Laski-Egan evidence and had obtained discovery of the CMB checks six days before they were put into evidence. Counsel had enough knowledge of Mrs. Brooke's prospective appearance to have served a *subpoena duces tecum* on the preparer of an affidavit she had signed. He also interviewed her and obtained copies of prior statements during a recess and evening after her direct testimony. Counsel's only substantial complaint is the denial of a two weeks continuance, not clearly sought until the day before the trial ended, in order to make a trip to Switzerland, Australia, or both, in an endeavor to develop proof that the $383,000 paid through CMB to Leonard might have come from the Australian bank which constituted an exception in the August, 1969, affidavit. The request was unaccompanied by any showing that this travel would be

productive and the court was justified in rejecting it as a ploy.

(b) Many pages of the briefs are devoted to the defense's claim that the Government improperly obstructed its interviews of several IRS employees. After defense counsel had written to them, the employees apparently referred the letters to the Assistant United States Attorney who was to prosecute the case. When the employees appeared for the taking of depositions, the prosecutor and defense counsel were in agreement that the interviews should be reported and that the witnesses should have an opportunity to read the daily copy and make appropriate corrections; however, defense counsel noted his dislike of the prosecutor's presence and particularly of his instructing the witnesses not to answer some of the questions. Defense counsel orally moved the court that the prosecutor be excluded or, in the alternative, be directed not to tell the witnesses not to answer questions. The court denied the motion; the Government later supplied, as promised, affidavits by the agents in which they dutifully stated that they "would have declined the interview unless permitted to be counseled, advised and guided by the Assistant United States Attorney assigned this case."

The question how far the prosecution may go in discouraging witnesses from being interviewed by defense counsel has received increasing attention since the decision in *Gregory* v. *United States,* 369 F.2d 185, 187-89 (D. C. Cir. 1966), although this circuit does not seem to have dealt with the issue. See *United States* v. *White,* 454 F.2d 435, 438-39 (7 Cir. 1971), *cert. denied* 406 U.S. 962 (1972); *United States* v. *Matlock,* 491 F.2d 504, 506 (6 Cir. 1974), *cert. denied* 419 U.S. 864 (1974); ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, § 3.1(c); Discovery and Procedure before Trial,

§ 4.1; Kamisar, LaFave and Israel, Modern Criminal Procedure 1236-37 (1974 ed.). None of these discussions, however, has focused on a situation like that here presented, where the persons sought to be interviewed are government employees who in some sense are part of the prosecutorial team; where most of the disclosure sought relates to the internal workings of a government agency; and where the agency has established procedures in regard to disclosure, 26 C.F.R. § 301.9000-1(c) and (d), which have apparently been ignored. Indeed the method devised by Leonard's trial counsel seems more like an ingenious way for getting around the limitation of discovery in the last sentence of F.R.Cr.P. 16(b).

This case does not require us to decide issues of such importance, for on this record we fail to see how the defendant has been prejudiced in any significant degree. The prosecutor intervened primarily to prevent answers being given to questions directed to what the judge called "talks between the agents themselves, 'What did you say to each other about the Leonard case?'" Such relevance as there might be in such answers would relate mainly to the suppression hearing, as to which the need for interviews beforehand is much less than in the case of a jury trial. The prime example of obstruction cited by Leonard's counsel consists of the prosecutor's instructing Special Agent Shulman not to answer broad questions concerning what he had done in "the investigation" from March or April, 1972, until June, 1972, and what further steps he had taken after July, 1972. The relevance of this is not self-evident, and the defendant has not clarified the matter for us. The interview with revenue agent Laski, the only agent who testified at trial, runs over fifty-seven typewritten pages and was relatively free of interruptions by the prosecutor; Leonard has not shown how the few negative instructions

given by the prosecutor impeded effective cross-examination.

(c) Counsel makes a variety of attacks, unnecessary to detail, on the methods by which the prosecution secured the presence of Mrs. Brooke. Apart from the fact that it is not clear that these objections were raised below and that they are of doubtful merit, the short answer is that impropriety in the method by which the prosecution has obtained the attendance of a witness, while a proper subject for cross-examination or proof insofar as the impropriety may go to the weight of the witness' testimony, is not of itself a ground for reversal.

• • • •

We have considered the other arguments made by Leonard's indefatigable appellate counsel but do not believe they warrant prolongation of this opinion.

The judgment of conviction is affirmed.

Appendix B, Opinion, United States Court of Appeals for the Second Circuit, November 18, 1975, Denial of Rehearing and Suggestion for En Banc Consideration.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1176—September Term, 1974.

Docket No. 75-1153

Filed: November 18, 1975

UNITED STATES OF AMERICA,

Appellee,

v.

JACKSON D. LEONARD,

Defendant-Appellant.

Before:

MOORE, FRIENDLY and VAN GRAAFEILAND,

Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

In a petition for rehearing Leonard raised, inter alia, a claim that our discussion of the omission of income from his 1968 tax return, slip opinion at 5847-52, was incomplete in one respect. Our opinion assumed, on pp. 5849-50, that the only evidence of the alleged $73,742.33 loss of Leonard Inc., for the period February 1, 1968 through January 31, 1969, was "an unfiled tax return, signed only by the accounting firm and unexplained by any preparer . . "—in fact a copy of the unfiled return—whereas the defense had

Appendix B.

also introduced a copy of the same unfiled return signed by Leonard, and the Government had introduced the original financial books and records and cancelled checks of Leonard Inc., which allegedly "fully corroborate these losses." We called upon the Government to answer, and Leonard has replied. While the opinion should be corrected as hereafter set forth, our conclusion is not affected.

It is therefore ordered that:

(1) The second and third sentences of the first full paragraph on p. 5849 be changed to read:

> The defense offered two exhibits purporting to be copies of a proposed corporate income tax return for the period February 1, 1968 to January 31, 1969, see note 2, showing a loss of $73,742.33; both copies were subscribed by the accounting firm, and one was also signed "Jackson D. Leonard."

(2) The second and third sentences on p. 5850 are stricken and the following is substituted therefor:

> The corporate tax return was never filed. Even if the copies of the proposed return were admissible at all as proof of the facts stated in the absence of testimony by the preparer, which seems doubtful, see *Standard Oil Co. of California* v. *Moore,* 251 F.2d 188, 222-23 (9 Cir. 1957), *cert. denied,* 356 U.S. 975 (1958), the mere existence of copies of an unfiled return carries little weight; indeed, the defense's failure to call the preparer could properly give rise to a negative inference whether Leonard Inc. had a loss. See 8 Wigmore, Evidence § 2273 (McNaughton rev. 1961). The books and records were apparently "corrected" in several respects, including the moving of a $40,000 item from an income to a loan column; the "uncor-

rected" sheets would support the unsigned form showing a loss of only $29,017.77—not enough to counterbalance the $58,684.12 of undeposited Treadwell checks. If these changes could be explained, defendant had the burden of going forward and doing so by calling the preparer or some other witness. Moreover, the books were not closed on December 31, 1968, and the proposed return was for the wrong year.

(3) In all other respects the petition for rehearing by the panel is denied.

Appendix C, United States Court of Appeals for the Second Circuit, December 4, 1975, Stay of Mandate.

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UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of December, one thousand nine hundred and seventy-five.

United States of America,

Plaintiff-Appellee,

v.

Jackson D. Leonard,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated November 18, 1975 to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

LEONARD P. MOORE

HENRY J. FRIENDLY

E. A. VAN GRAAFEILAND
Circuit Judges

Appendix D, Title 26, U.S.C. Sec. 7206.

"26 U.S.C. § 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony."

Appendix E, United States Post Office Manual and Regulations.

CHIEF POSTAL INSPECTOR
Washington, DC 20260

May 5, 1975

Mr. Alan Kanzer, Esq.
Walter, Conston, Schurtman
and Gumpel, P. C.
Attorneys at Law
330 Madison Avenue
New York, New York 10017

Dear Mr. Kanzer:

Your letter of April 18, 1975, to the U. S. Postal Service, Attention: General Counsel, has been referred to me for reply. In your letter you requested, pursuant to the Freedom of Information Act, copies of Postal Service regulations, postal bulletins, and any other material relevant, during 1968 and 1969, to the initiation of a mail cover at the request of another agency.

On June 17, 1965, the Post Office Department published new regulations governing the use of mail covers in Postal Bulletin No. 20478, a copy of which is enclosed. These regulations are still in effect today. These regulations were subsequently published in Part 861 of the Postal Manual of the old Post Office Department, supplemented by section 233.2 of the Postal Service Manual. Enclosed are copies of these regulations. Also enclosed is a copy of the mail cover regulations which were recently republished in the Federal Register. This republication makes no substantive changes in mail cover procedures or safeguards, but it updates the provisions dealing with the delegation of mail cover authority to reflect the present organizational structure of the Postal Inspection Service.

Sincerely,

William J. Cotter
Chief Inspector

Enclosures

Subchapter 869 MAIL COVERS

Part 861

ADMINISTRATION

861.1 POLICY

The Post Office Department has established rigid controls and supervision with respect to the use of mail covers as investigative or law enforcement techniques.

861.2 SCOPE

These regulations establish the sole authority and procedure for initiating processing, placing and using mail covers. Any other regulations inconsistent or in conflict with these regulations are of no effect for postal employees.

861.3 DEFINITIONS

For purposes of these regulations, the following terms are hereby defined:

a. "Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third- or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (1) protecting the national security, (2) locating a fugitive, or (3) obtaining evidence of commission or attempted commission of a crime.

b. "Fugitive" is any person who has fled from the United States or any State, territory, the District of Columbia or possession of the United States, to avoid prosecution for a crime, to avoid punishment for a crime or to avoid giving testimony in a criminal proceeding.

c. "Crime," for purposes of these regulations, is any commission an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year.

d. "Law enforcement agency" is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

861.4 AUTHORIZATIONS—CHIEF POSTAL INSPECTOR

.41 The Chief Postal Inspector is the principal officer of the Post Office Department in the administration of all matters governing mail covers. He may delegate by written order any or all authority in this regard to not more than four subordinate officials within his Bureau.

.42 The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

a. When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

b. When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (1) protect the national security, (2) locate a fugitive, or (3) obtain information regarding the commission or attempted commission of a crime.

c. Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written request is received.

861.5 POSTAL INSPECTORS IN CHARGE

.51 All Postal Inspectors in Charge, and not more than three designees, pursuant to delegations in writing, may order mail covers under the following circumstances:

a. Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

b. Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime. Excepting fugitive cases, any request from a Federal agency for a mail cover and the determination made shall promptly be transmitted to the Chief Postal Inspector for review.

.52 Except where mail covers are ordered by the Chief Postal Inspector, or his designee, request for mail covers must be approved by the Postal Inspector in Charge, or his designee, in each district in which the mail cover is to operate.

.53 Where time is of the essence, the Postal Inspector in Charge, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written order is received.

861.6 LIMITATIONS

.61 No persons in the postal service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

.62 No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

.63 No officer or employee of the postal service other than the Chief Postal Inspector, or Postal Inspectors in Charge, and their designees, are authorized to order mail covers.

.64 Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than 30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

.65 No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

.66 Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a new mail cover order must be requested consistent with these regulations.

861.7 RECORDS

.71 All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

.72 The Postal Inspectors in Charge shall submit copies of all requests for mail covers to the Chief Postal Inspector, together with reports of the action ordered thereon.

.73 If the Chief Postal Inspector determines a mail cover was improperly ordered by a Postal Inspector in Charge or his designee all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

.74 Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

.75 The retention period for files and records pertaining to mail covers shall be 8 years.

861.8 REPORTING TO REQUESTING AUTHORITY

Once a mail cover has been duly ordered, authorization may be delegated to any officer in the postal service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a Postal Inspector.

861.9 REVIEW

.91 The Chief Postal Inspector, or his designee, shall review all actions taken by Postal Inspectors in Charge or their designees upon initial submission of a report on a request for mail cover.

.92 The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

Organization and Administration TI—125, 11-18-66—Issue 1012

* U.S. GOVERNMENT PRINTING OFFICE : 1966 O—356-039

233.2 MAIL COVERS

.21 DEFINITION

A mail cover is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third- or fourth-class mail matter as now sanctioned by law, to obtain information in the interest of (1) protecting the national security (2) locating a fugitive or (3) obtaining evidence of commission or attempted commission of a crime.

.22 AUTHORITY

Only the Chief Postal Inspector or his designee may order mail covers. Under no circumstances shall a postmaster or postal employee furnish information as defined in 233.21 to any person except as authorized by the Chief Postal Inspector or his designee.

Appendix E.

POSTAL BULLETIN

Instructions and Information For Postal Employees
Published Weekly

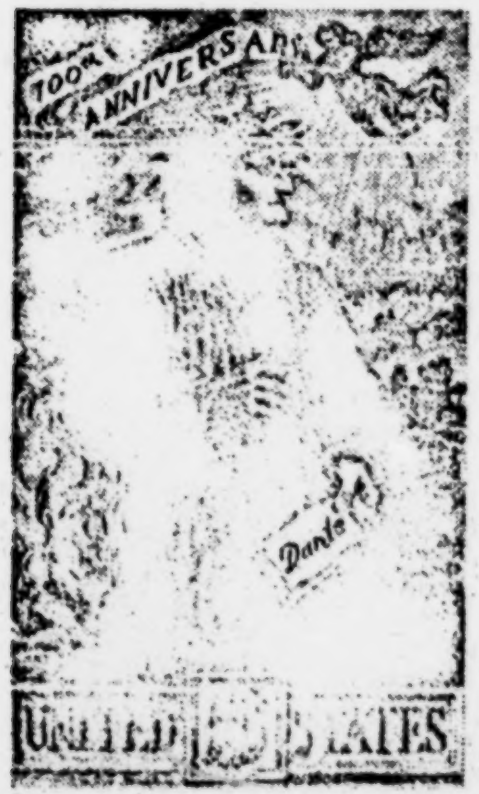
LXXXVI Washington, D.C. 20260, Thursday, June 17, 1965—Eight Pages 2047

All Postal Installations

5-Cent Dante Alighieri Commemorative Postage Stamp

The 5-cent stamp commemorating the 700th anniversary of the birth of the great Italian poet, Dante Alighieri, will be initially released through the San Francisco, Calif., post office, on July 17, 1965.

POSTMASTERS SHALL NOT PLACE THIS STAMP ON SALE BEFORE JULY 18, 1965



Size: 0.84" x 1.44" (vertical)
ISSUED IN PANES OF 50
Color: Maroon on tan paper
Initial printing: 112 million

Douglas Gorsline's design simulates the style of early Florentine allegorical paintings. Dante is shown wearing a laurel wreath, symbolic of poetry, against a background related to the poem "The Divine Comedy."

To obtain first-day cancellations, collectors may submit requests to the Postmaster, San Francisco, Calif. 94101. See Postal Manual, section 145.3. Selected mint stamps will be available at the Philatelic Sales Agency, Post Office Department, Washington, D.C. 20260, on and after July 19, 1965.

All classes of post offices will receive an initial supply of the stamps under the automatic distribution schedule.

First- and second-class post offices requiring additional *bulk quantities* may submit a separate requisition (Form 3356) to the Bureau of Engraving and Printing (Item 456) with memorandum, POD 31, stating that the stamps are required in addition to those automatically furnished.

All post offices requiring *less than bulk* quantities in addition to the automatic distribution may submit a separate requisition (Form 17) to their RDPO and endorse at top "Additional." All requisitions not so endorsed will be returned.—*Office of the Special Assistant to the Postmaster General, 6-17-65.*

Appendix E.

All Postal Personnel

MAIL COVERS

Effective immediately, the following regulations govern procedures concerning mail covers.

Policy:

It is hereby declared to be the policy of the Post Office Department that rigid controls and supervision be established with respect to the use of mail covers as investigative or law enforcement techniques. In order that this policy be effectively promulgated, implemented and enforced, the following regulations are adopted.

Scope:

The following regulations hereby establish the sole authority and procedure for the initiating, processing, placing and using of mail covers. Any other regulations inconsistent or in conflict with these regulations are of no effect for postal employees.

Definitions:

For purposes of these regulations, the following terms are hereby defined:

"Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second, third or fourth class mail matter as now sanctioned by law, in order to obtain information in the interest of (a) protecting the national security, (b) locating a fugitive, or (c) obtaining evidence of commission or attempted commission of a crime.

"Fugitive" is any person who has fled from the United States or any State, territory, the District of Columbia or possession of the United States, to avoid prosecution for a crime, to avoid punishment for a crime or to avoid giving testimony in a criminal proceeding.

"Crime," for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding one year.

"Law enforcement agency" is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

Authorizations—Chief Postal Inspector:

The Chief Postal Inspector is the principal officer of the Post Office Department in the administration of all matters governing mail covers. And

Appendix E.

MAIL COVERS

(*Continued from p. 1*)

he may delegate by written order any or all authority in this regard to not more than four subordinate officials within his Bureau.

The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

1. Where he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

2. Where written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (a) protect the national security, (b) locate a fugitive, or (c) obtain information regarding the commission or attempted commission of a crime.

3. Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within two business days. However, no information shall be released until an appropriate written request is received.

Postal Inspectors in Charge:

All Postal Inspectors in Charge, and not more than three designees pursuant to delegations in writing, may order mail covers under the following circumstances:

1. Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

2. Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime. Excepting fugitive cases, any request from a Federal agency for a mail cover and the determination made shall promptly be transmitted to the Chief Postal Inspector for review.

3. Except where mail covers are ordered by the Chief Postal Inspector, or his designee, request for mail covers must be approved by the Postal Inspector in Charge, or his designee, in each district in which the mail cover is to operate.

4. Where time is of the essence, the Postal Inspector in Charge, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within two business days. However, no information shall be released until an appropriate written order is received.

Limitations:

1. No persons in the Postal Service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

2. No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

3. No officer or employee of the Postal Service other than the Chief Postal Inspector, or Postal Inspectors in Charge, and their designees, are authorized to order mail covers.

4. Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than 30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

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5. No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

6. Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a new mail cover order must be requested consistent with these regulations.

Records:

1. All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

2. The Postal Inspectors in Charge shall submit copies of all requests for mail covers to the Chief Postal Inspector, together with reports of the action ordered thereon.

3. If the Chief Postal Inspector determines a mail cover was improperly ordered by a Postal Inspector in Charge or his designee all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

4. Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

5. The retention period for files and records pertaining to mail covers shall be 8 years.

Reporting to Requesting Authority:

Once a mail cover has been duly ordered, authorization may be delegated to any officer in the Postal Service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a Postal Inspector.

Review:

1. The Chief Postal Inspector, or his designee, shall review all actions taken by Postal Inspectors in Charge

(*Continued on p. 3*)

CONTENTS

MAIL COVERS

(*Continued from p. 2*)

or their designees upon initial submission of a report on a request for mail cover.

2. The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

* * * * *

Existing instructions will be revised accordingly. Postmasters shall not, under any conditions, place mail covers without prior approval from their Postal Inspectors in Charge.

Postmaster General.

Appendix E.

All Postal Installations

Jet Airmail Service—AM–9

On or about July 4, 1965, Braniff Airways, Inc. will inaugurate jet airmail service from Waterloo, Iowa.

An official cachet will be furnished for application to philatelic covers transported only on Braniff's first jet flight departing from Waterloo on that day. The covers will be backstamped at the terminus of the flight.

The usual philatelic treatment, outlined in section 145.5, Postal Manual, will be provided.

Patrons desiring to receive this cachet should forward their covers in another envelope to:

Postmaster
Waterloo, Iowa 50701

First-flight covers should reach Waterloo at least 5 days before the flight date.—*Bureau of Transportation and International Services, 6–17–65.*

All Postal Installations

Arrest of Postal Offender

The following postal offender has been apprehended:

Ronald Guy Picklesimer

Destroy the wanted circular concerning him.—*Bureau of the Chief Postal Inspector, 6–17–65.*

Field Printing and Duplicating

1. Purpose

These instructions will enable postal installations to manage their printing and duplicating activities more effectively. They are in line with the President's policy for reducing paperwork and for saving manpower and money. The new procedures are effective immediately.

2. Program for Improvement

Major efficiencies in the duplicating, copying, and publication areas can be achieved under these procedures. The program will assure that:

- Only necessary and justified publications are produced at the post office level.
- Only necessary equipment is rented or purchased.
- Printing and binding regulations of the Congressional Joint Committee on Printing are understood and followed.
- Duplicating and printing activities are consolidated wherever possible.
- Coordination of policy matters concerning duplicating and printing is achieved.
- Responsibilities in these areas are correctly placed and clearly understood.

3. Field Printing

Field offices with duplicating equipment must follow the provisions of Handbook M–13, Field Printing, Duplicating and Related Services. That handbook is being revised and will include all necessary information on the subject. It will be distributed directly to offices with duplicating equipment.

4. Procurement of Equipment

The Congressional Joint Committee on Printing requires that requests for printing and duplicating equipment be approved by qualified personnel. Therefore, all field requests (except those from the Inspection Service) for the purchase or rental of printing and duplicating equipment must be sent on Form 73 to the regional procurement and supply officer with a detailed justification so that he can obtain the necessary approval. There will be no exception to the foregoing procedure.

5. Managing Local Publications

This section establishes a program for managing local publications and keeping them within reasonable bounds. It applies only to formal types of publications—manuals, handbooks, pamphlets, booklets, and

Appendix E.

brochures. Office memorandums, schemes and schedules and changes thereto, and internal circular issuance systems are not affected.

Postmasters will submit proposed publications in outline form to the regional postal systems division for regional approval. Request for approval will include justification for the publication, the estimated number of printed pages, the quantity to be printed, and a list showing the number to be distributed to each receiving point.

If the postal systems division determines that the proposal meets the following criteria, it will secure approval of the Regional Director and return the outline to the post office for preparation of the final manuscript. The postal systems division will indicate whether the publication is to be reproduced at the post office or returned to the regional office for final printing.

Consider the following criteria thoroughly before requesting approval for a publication:

a. Is the proposed publication absolutely necessary? Local publications must be limited to those which are essential to the service.

b. Does the proposal repeat Headquarters, Postal Bulletin, Postal Manual or other instructions? Such repetition *must* be avoided.

c. If the publication is considered to be essential, how much will it cost? An estimated per page cost of $150 is considered a reasonable figure (General Services Administration uses $100 per page). This cost includes such factors as salaries, draft preparation, approval time, printing materials and equipment, and a factor for general overhead.

d. Does the proposal contain material which has nationwide possibility? If so, the postmaster should request the region to consider proposing a national publication.

Appendix E.

RULES AND REGULATIONS 11379

Act o

(Title
(National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 19[illegible]; effective Jan. 28, 1969 (33 FR 17701, Nov. 28, 1968), as amended, 42 U.S.C. 4001-4128; and Secretary's delegation of authority to Federal Insurance Administrator, 34 FR 2680, Feb. 27, 1969)

Issued: February 28, 1975.

J. ROBERT HUNTER,
Acting Federal Insurance Administrator.

[FR Doc.75-6553 Filed 3-11-75;8:45 am]

Appendix E.

Title 39—Postal Service

CHAPTER I—UNITED STATES POSTAL SERVICE

PART 233—INSPECTION SERVICE AUTHORITY

Mail Covers

The Postal Service has decided to republish the regulations governing the use of the mail cover as an investigative technique to make these regulations more accessible to the public, and to discourage confusion concerning the nature and uses of this important law enforcement tool. In this republication the Postal Service has updated the provisions dealing with the delegation of mail cover authority to reflect the present organizational structure of the Postal Inspection Service. However, no substantive changes have been made in mail cover procedures or safeguards.

The use of mail covers has been governed by regulations contained in § 233.2 of the *Postal Service Manual*, supplemented by provisions formerly contained in Part 861 of the *Postal Manual* of the old Post Office Department which have been retained as operating instructions by the Postal Inspection Service. The combination of these provisions under one heading in the Code of Federal Regulations will improve their accessibility and facilitate their interpretation.

A mail cover is a relatively simple investigative or law enforcement technique. It involves recording the name and address of the sender, the place and date of postmarking, the class of mail, and any other data appearing on the outside cover of a piece of mail. Mail is not delayed in connection with a mail cover, and the contents of first-class mail are not examined. As sanctioned by law, the contents of second-, third-, and fourth-class mail matter may be examined in connection with a mail cover.

In their new format, the mail cover regulations of the Postal Service continue existing procedural and substantive safeguards designed to assure the confidentiality of the mail cover process and prevent the unjustified use of mail covers. Mail covers are available to law enforcement agencies only in order to obtain information in the interest of (1) protecting the national security, (2) locating a fugitive, or (3) obtaining evidence of commission or attempted commission of a crime. Mail covers are ordered pursuant to a written request from a law enforcement agency only if the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary for a legitimate purpose. No officers or employees of the Postal Service other than the Chief Postal Inspector, a Postal Inspector in Charge, and a limited number of their designees, are authorized to order mail covers. Only the Chief Postal Inspector, or his designees at Inspection Service Headquarters, may order a national security mail cover. Mail covers do not include matter mailed between the mail cover subject and his known attorney-at-law; and except in fugitive cases, no mail cover remains in force when the subject has been indicted for any cause. Any data concerning mail covers is made available to any mail cover subject in any legal proceeding through appropriate discovery procedures. These administrative safeguards afford significant protection to the privacy of the users of the mail, without compromising the effectiveness of the mail cover.

Accordingly, the Postal Service adopts the following amendments to the provisions concerning Postal Service management organization, procedure, and practice with regard to mail covers, effective March 14, 1975:

§ 233.2 [Redesignated]

1. In 39 CFR Part 233, § 233.2 *Withdrawal of mail privileges* is renumbered as § 233.3, and a new § 233.2 is added to read as follows:

§ 233.2 Mail covers.

(a) *Policy.* The U.S. Postal Service maintains rigid controls and supervision with respect to the use of mail covers as investigative or law enforcement techniques.

(b) *Scope.* These regulations constitute the sole authority and procedure for initiating, processing, placing and using mail covers.

(c) *Definitions.* For purposes of these regulations, the following terms are hereby defined:

(1) "Mail cover" is the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the contents of any second-, third-, or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (i) protecting the national security, (ii) locating a fugitive, or (iii) obtaining evidence of commission or attempted commission of a crime.

(2) "Fugitive" is any person who has fled from the United States or any State,

Appendix E.

territory, the District of Columbia, or possession of the United States, to avoid prosecution for a crime, to avoid punishment for a crime or to avoid giving testimony in a criminal proceeding.

(3) "Crime", for purposes of these regulations, is any commission of an act or the attempted commission of an act that is punishable by law by imprisonment for a term exceeding 1 year.

(4) "Law enforcement agency" is any authority of the Federal Government or any authority of a State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime.

(d) *Authorizations—Chief Postal Inspector.* (1) The Chief Postal Inspector is the principal officer of the Postal Service in the administration of all matters governing mail covers. He may delegate any or all authority in this regard to not more than two designees at Inspection Service Headquarters. Except for national security mail covers, he may also delegate any or all authority to the Regional Chief Postal Inspectors. All such delegations of authority shall be issued through official directives.

(2) The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:

(i) When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.

(ii) When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (C) obtain information regarding the commission or attempted commission of a crime.

(iii) Where time is of the essence, the Chief Postal Inspector, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written request is received.

(e) *Postal Inspectors in Charge.* (1) All Postal Inspectors in Charge, and not more than three designees pursuant to delegations in writing, may order mail covers within their districts under the following circumstances:

(i) Where he has reason to believe the subject or subjects are engaged in an activity violative of any postal statute.

(ii) Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would aid in the location of a fugitive, or that it would assist in obtaining information concerning the commission or attempted commission of a crime.

(2) Except where mail covers are ordered by the Chief Postal Inspector, or his designee, requests for mail covers must be approved by the Postal Inspector in Charge, or his designee, in each district in which the mail cover is to operate.

(3) Where time is of the essence, Postal Inspector in Charge, or his designee, may act upon an oral request to be confirmed by the requesting authority in writing within 2 business days. However, no information shall be released until an appropriate written order is received.

(f) *Limitations.* (1) No person in the Postal Service, except those employed for that purpose in dead-mail offices, may break or permit breaking of the seal of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime.

(2) No mail covers shall include matter mailed between the mail cover subject and his known attorney-at-law.

(3) No officer or employee of the Postal Service other than the Chief Postal Inspector, or Postal Inspectors in Charge, and their designees, are authorized to order mail covers. Under no circumstances shall a postmaster or postal employee furnish information as defined in § 233.2(c) to any person except as authorized by the Chief Postal Inspector, a Postal Inspector in Charge, or their designees.

(4) Excepting mail covers ordered upon subjects engaged, or suspected to be engaged, in any activity against the national security, or activity violative of any postal law, no mail cover order shall remain in force and effect for more than 30 days. At the expiration of such period, or prior thereto, the requesting authority may be granted additional 30-day periods under the same conditions and procedures applicable to the original request.

(5) No mail cover shall remain in force longer than 120 days unless personally approved for further extension by the Chief Postal Inspector.

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(6) Excepting fugitive cases, no mail cover shall remain in force when the subject has been indicted for any cause. If the subject is under investigation for further criminal violations, a new mail cover order must be requested consistent with these regulations.

(g) *Records.* (1) All requests for mail covers, with records of action ordered thereon, and all reports issued pursuant thereto, shall be deemed within the custody of the Chief Postal Inspector. However, the physical housing of this data shall be at the discretion of the Chief Postal Inspector.

(2) The Postal Inspectors in Charge shall promptly submit copies of all requests for mail covers and the determination made thereon to the Chief Postal Inspector, or to his designee for review.

(3) If the Chief Postal Inspector, or his designee, determines a mail cover was improperly ordered by a Postal Inspector in Charge or his designee all data acquired while the cover was in force shall be destroyed, and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

(4) Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures.

(5) The retention period for files and records pertaining to mail covers shall be 8 years.

(h) *Reporting to Requesting Authority.* Once a mail cover has been duly ordered, authorization may be delegated to any officer in the Postal Service to transmit mail cover reports directly to the requesting authority. Where at all possible, the transmitting officer should be a Postal Inspector.

(i) *Review.* (1) The Chief Postal Inspector, or his designee, shall review all actions taken by Postal Inspectors in Charge or their designees upon initial submission of a report on a request for mail cover.

(2) The Chief Postal Inspector's determination in all matters concerning mail covers shall be final and conclusive and not subject to further administrative review.

2. In the table of sections of 39 CFR Part 233 the following entries are revised to read as follows:

Sec.
233.1 Circulars and rewards.
233.2 Mail covers.
233.3 Withdrawal of mail privileges.

(39 U.S.C. 401, 404, 410)

ROGER P. CRAIG,
Deputy General Counsel.

[FR Doc.75-6330 Filed 3-11-75;8:45 am]

Title 41—Public Contracts and Property Management

CHAPTER 1—FEDERAL PROCUREMENT REGULATIONS

[FPR Amdt. 140]

PART 1-7—CONTRACT CLAUSES

Subcontracts

This amendment of the Federal Procurement Regulations prescribes a new Subcontracts clause for use in fixed-price supply and construction contracts. The clause requires the contractor to obtain the contracting officer's written consent prior to entering into certain types and dollar values of subcontracts. The clause becomes operative only with respect to unpriced modifications under fixed-price contracts. Adoption of the clause reflects a significant part of Recommendation A-37 of the Commission on Government Procurement. This amendment also adds a requirement for the submission of cost accounting standards information in connection with subcontracts under cost-reimbursement type supply contracts, and incorporates a new reference to the clause requiring the payment of interest on contractors' claims.

The table of contents for Part 1-7 is changed to add new entries as follows:

Sec.
1-7.102-22 Payment of interest on contractors' claims.
1-7.103-27 Subcontracts.
1-7.602-16 Subcontracts.

Subpart 1-7.1—Fixed-Price Supply Contracts

1. Section 1-7.102 required clauses is amended by the addition of § 1-7.102-22 as follows:

-7.102-22 Payment of interest on contractors' claims.

Insert the clause set forth in § 1-1.322 under the conditions prescribed therein.

2. Section 1-7.103 *Clauses to be used when applicable* is amended by the addition of § 1-7.103-27 as follows:

§ 1-7.103-27 Subcontracts.

The following clause may be inserted in fixed-price supply contracts whenever it is likely that subsequent to award major modifications will be initiated pur-

Appendix E.

suant to the Changes clause, or other contract provisions, and that such modifications will result in the placement of additional subcontracts. The pricing arrangements of such subcontracts have an impact upon the final price of the modification; therefore, it is essential that they be made available by the contractor for review by the contracting officer (see §§ 4-3.807-10(b) and 1-3.903).

SUBCONTRACTS

(The provisions of this clause do not apply to firm fixed-price and fixed price with escalation (economic price adjustment) contracts. The clause does apply to new subcontracts or modifications of existing subcontracts which are necessitated because of unpriced contract changes pursuant to the Changes clause or other provisions of this contract.)

(a) As used in this clause, the term "subcontract" includes purchase orders.

(b) The Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract if the Contractor's procurement system has not been approved by the Contracting Officer and if the subcontract:

(i) Is to be a cost-reimbursement, time and materials, or labor-hour contract which it is estimated will involve an amount in excess of ten thousand dollars ($10,000) including any fee;

(ii) Is proposed to exceed one hundred thousand dollars ($100,000); or

(iii) Is one of a number of subcontracts, under this contract, with a single subcontractor for the same or related supplies or services which, in the aggregate, are expected to exceed one hundred thousand dollars ($100,000).

(c) The advance notification required by paragraph (b) above shall include:

(i) A description of the supplies or services to be called for by the subcontract;

(ii) Identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the competition obtained;

(iii) The proposed subcontract price, together with the Contractor's cost or price analysis thereof;

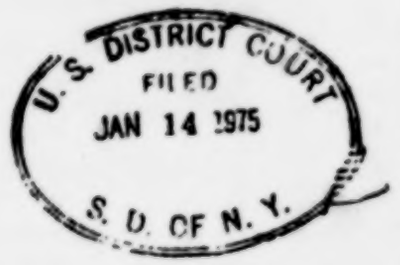
(iv) The subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost of Pricing Data, when such data and certificates are required by other provisions of this contract to be obtained from the subcontractor;

(v) Identification of the type of subcontract to be used;

(vi) A memorandum of negotiation which sets forth the principal elements of the subcontract price negotiations. A copy of this memorandum shall be retained in the Contractor's file for use of Government reviewing authorities. The memorandum shall be in sufficient detail to reflect the most significant considerations controlling the establishment of initial or revised prices. The memorandum should include an explanation of why cost or pricing data was, or was not

Appendix F, United States District Court For the Southern District of New York, Letter Rogatory to the Appropriate Judical Authority in London, England, January 14, 1975.

SR:dm



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

- v - : 74 Cr. 599 (RO)

JACKSON D. LEONARD, :

Defendant. :

TO: THE APPROPRIATE JUDICIAL AUTHORITY IN LONDON, ENGLAND:

The United States District Court for the Southern District of New York presents its compliments to the appropriate judicial authority in London, England, and requests its assistance in the following manner.

1. Jackson D. Leonard is presently on trial before this Court and a jury pursuant to a ~~three~~ Two-count criminal indictment filed against him on June 13, 1974 by a federal Grand Jury sitting in the Southern District of New York. The charges he faces all arise from the making of allegedly false and perjurious statements, in violation of United States criminal laws.

2. Specifically, he is charged, in two counts, with violation of Section 7206(1) of Title 26 of the United States

Appendix F.

Code, which provides, in pertinent part, that:

> "Any person who ... wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Further, he is charged, in a third count, with violation of Section 1001 of Title 18 of the United States Code, which provides, in pertinent part, that:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully ... makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Signature
U.S.D.J.

3. As the result of the testimony and documents before me in this case and the representations made by the United States Government, I have determined that one EVA BROOKE, whom the United States seeks to call as a witness in this case, is likely to be able to provide the Court and jury with testimony having a material bearing on the instant case.

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Specifically, I am informed by the United States that the defendant Leonard made materially incriminating statements to Ms. Brooke and that Ms. Brooke has previously admitted as much in conversations with representatives of the United States.

4. Further, I am informed by the United States that Ms. Brooke is a British citizen, but that she has resided in the United States for most of the past two or three years and has a house in Oklahoma. However, I am informed that, even though she was previously served with a subpoena requiring her attendance as a witness before this Court in this present criminal case, she is presently residing in London at an address now known to the United States Government and has resisted coming to New York in compliance with the subpoena, even though the United States has agreed to bear all her reasonable travel expenses.

5. Accordingly, it is hereby requested, if appropriate pursuant to the Foreign Tribunals Evidence Act of 1856 as construed in terms of the Extradition Act of 1870, or pursuant to other pertinent laws of the United Kingdom, that the appropriate judicial authority in London, England enter such orders as British law permits, directing EVA BROOKE to appear as soon as physically possible before the undersigned in Room 518 of the United States Courthouse, 40 Centre Street, New

Appendix F.

York, New York to give evidence in the criminal trial now pending before this Court, and directing such other steps (such as arrest and extradition) that may be necessary in order to secure compliance with such orders.

6. This Court expresses its appreciation to the appropriate judicial authority in London, England for its courtesy and assistance in this matter.

Dated: New York, New York

January 14, 1975

RICHARD OWEN
United States District Judge

Appendix G, Internal Revenue Service News Release No. 897.

Internal Revenue Service News Release No. 897, issued October 3, 1967, provides:

> "In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.
>
> Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.
>
> Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.
>
> On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'
>
> If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigations become necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.
>
> If it becomes necessary to take a person into custody, Special Agents must give a comprehensive statement of rights before any interrogation. This statement warns a person in custody that he may remain silent and that anything he says may be used against him. He is also told that he has the right to consult or have present his own counsel before making a statement or answering any questions and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner.

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IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons."
(reprinted in 1967 CCH Fed. Tax Rep. ¶ 6832).

Internal Revenue Service News Release No. 949, issued November 26, 1968, further provides:

"One function of a Special Agent is to investigate possible criminal violations of Internal Revenue laws. At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding."

(reprinted in 1968 CCH Fed. Tax Rep. ¶ 6946 and 1969 P-H Taxes, ¶ 55, 467).

Appendix H, Order United States Supreme Court, Extending Time to File Petition for Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES

No. A-516

JACKSON D. LEONARD,
Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 17, 1976.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of December, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

75-
No. 1016

JACKSON D. LEONARD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES SCHREIBER
330 Madison Avenue
New York, N.Y. 10017
Attorney for Jackson D. Leonard

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IN THE

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OCTOBER TERM, 1975

No. 1016

JACKSON D. LEONARD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

On January 6, 1976, Jackson D. Leonard, the petitioner, filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter "the Petition").

On February 26, 1976, Solicitor General Robert H. Bork wrote to the Court seeking an extension of time to file the government's response until April 8, 1976. In response, on March 2, 1976, petitioner's counsel wrote to the Court expressing concern that if the delay were granted, a pending case before the Court, which raised a related (but not

identical) issue might be decided before the Court had an opportunity to consider the related issue raised in the Petition.*

Thereafter, by letter dated March 12, 1976, the Court granted the government an extension, but only until March 31, 1976.

No response was filed by the government on March 31, 1976, but the Court has scheduled the Petition for conference April 16, 1976.

The government has advised petitioner, that notwithstanding the March 31, 1976 cut-off, it would seek to file its response by April 12, 1976 and would mail its brief to counsel for the petitioner at that time. Since this would deprive petitioner of a substantial right, namely adequate time to file a Reply Brief before conference, Rule 24(4), Supreme Court Rules, the within Supplement to the Petition is being filed instead.*

---

* The pending case, *Beckwith* v. *U.S.*, No. 74-1243, was argued December 1, 1975.

* This Supplement to the Petition is submitted at the suggestion of the Clerk's Office. By letter dated April 6, 1976 to the Court, petitioner has also requested that, in view of the government's failure to file its brief within the required period, the Petition for Certiorari be granted, the judgment of the Second Circuit reversed, and the case remanded with instructions that the indictment be dismissed.

ARGUMENT

A recently obtained affidavit* of Eva Brooke, a key witness at trial, demonstrates that her testimony, which was "crucial" to the government's case, was obtained as a result of false threats that she would be arrested and extradited from England.

These circumstances were improperly concealed from defense counsel at trial and deprived petitioner of a fair trial.

1. The Claims Asserted in the Petition for Certiorari Are Corroborated by the Affidavit.

Petitioner previously raised in the Petition the claim that during the trial, the government had obtained the presence and testimony of a key foreign witness, Eva Brooke, "upon the false threat that she was otherwise subject (in England) to 'extradition and arrest' although she was completely innocent of any wrongdoing". Petition, page 29. Petitioner had further claimed that the government had failed to disclose and indeed had concealed these circumstances at trial, in violation of this Court's mandate in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963).

It was noted then that the first time defense counsel learned that improper threats may have been used against the witness was after the trial, after sentence, and only when the government filed the Letter Rogatory (which it had secretly obtained *ex parte* during the trial) as part of the record on appeal. Petition, page 31, fn. As was also pointed out in the Petition, there was no legitimate prosecutorial or judicial reason for this *ex parte* procedure.**

* The affidavit dated March 8, 1976 is set forth in the Appendix. The original has been lodged with the Clerk of the Court.

** Indeed, *ex parte* practice of the sort conducted herein was recently criticized by a report by the Association of the Bar of

(footnote continued on following page)

The claims raised in the Petition were based primarily on conclusions drawn from the Letter Rogatory itself, which explicitly requested that Eva Brooke be arrested and extradited, if necessary, by a Court in London, England in order to compel her presence and testimony in New York.

The affidavit of Mrs. Brooke set forth in the Appendix now clearly demonstrates that the inferences which had been drawn from the improper Letter Rogatory were clearly correct. Indeed, it can fairly be said that the inferences drawn were far less damaging than the reality.

The facts, as set forth in Mrs. Brooke's affidavit, are as follows: The government first contacted her in November or December 1974, when it served a subpoena on her while she was "winding up [her] late husband's [estate]" in Oklahoma. She was thereafter interviewed in New York and "instructed [by the prosecutor] not to contact Mr. Leonard".

In January 1975, while she was at her home in England, she received calls from the prosecutor who told her he wanted her "to fly to New York to testify against Mr. Leonard and that he had obtained a second subpoena• directing me to appear in New York".

Although she was too ill to travel "as a result of the after effect of an automobile accident", the prosecutor insisted. In fact, the prosecutor said that she was a "key witness" and that her "testimony would be critical". Indeed, the prosecutor told her that medical assistance

(footnote continued from preceding page)

New York. See the Record of the Association of the Bar of the City of New York, Committee Report, Formal Opinion No. 887, by the Committee on Professional and Judicial Ethics, Volume 30, No. 7 at page 507, October 1975. Additionally, since this was simply a tax case against a chemical engineer (petitioner's profession), the government's conduct below cannot be justified by reason of any legitimate concern for the safety of a witness.

• Possibly the improper Letter Rogatory.

would be furnished but Mrs. Brooke "repeated" that she was not able to travel.

Notwithstanding, the prosecutor continued to phone her in England and insist that she come. The prosecutor even phoned her doctors in England to confirm the state of her health. Thereafter, she received a call from someone at the American Embassy in London who also told her that she "had to testify" and further "that the U.S. Government was prepared to have a nurse accompany her t New York".

Mrs. Brooke then tried to phone the prosecutor in New York to tell him that she could not travel. The prosecutor was in court at the time and she spoke instead to a man who said he was the prosecutor's assistant. The prosecutor's assistant explicitly threatened her and told her that if she "did not come to New York, *the United States Government would have me arrested in England and extradited to the United States*". [Emphasis added] The assistant further threatened that in the future she "would never be allowed into the United States again".

The next day, the prosecutor again called her insisting that she testify.

> "By that time I was exhausted from the daily pressure and terrified that if I failed to come to the United States, *I would be subject to arrest and extradition.*" [Emphasis added]

As a result, Mrs. Brooke, who, it must be remembered, had been recently widowed, flew to New York. She was called as a witness and testified, but did not "disclose to [petitioner's] lawyer the circumstances under which she had come to the trial".

2. The Threats to Mrs. Brooke That She Was Subject to Arrest and Extradition in England Were False, but Nonetheless "Terrified" Her Into Testifying as Required by the Government, Which Circumstances Were Improperly Concealed From Defense Counsel.

The threats by the government that unless she came to the United States, she would be arrested and extradited were false. As noted at pages 29-31 of the Petition, there is no legal authority to arrest or extradite a witness from England to testify in a trial in the United States. The Letter Rogatory which the government drafted and which purported to rely on such authority was simply a phony.

Nevertheless, Mrs. Brooke, a widow who was concededly ill at the time, was particularly vulnerable to improper intimidation. Indeed, she states explicitly that unless she did what the prosecutor required, she was "terrified that . . . I would be subject to arrest and extradition" in England.

The Second Circuit stated the following with respect to this claim:

> "Counsel makes a variety of attacks, unnecessary to detail, on the methods by which the prosecution secured the presence of Mrs. Brooke. Apart from the fact that it is not clear that these objections were raised below and that they are of doubtful merit, the short answer is that impropriety in the method by which the prosecution has obtained the attendance of a witness, while a proper subject for cross-examination or proof insofar as the impropriety may go to the weight of the witness' testimony, is not of itself a ground for reversal." Appendix A, page 29a.

The objections could never have been "raised below" because the Letter Rogatory was obtained secretly and "ex parte." Since defense counsel was unaware of the threats, no cross-examination or proof could possibly have

been offered. Additionally, the Court makes a very substantial assumption; namely, that the false threats had no effect on the content of her testimony, an assumption which it is respectfully submitted cannot safely be made and indeed is wrong. See *U.S.* v. *Miller,* 411 F.2d 825, 831-832 (2d Cir. 1969).

Most importantly, however, it must be emphasized that the circumstances were never revealed to the Petitioner's attorney at trial but rather were concealed from him, through the *ex parte* procedure adopted by the prosecutor. See page 31, Petition for Certiorari.

3. The Affidavit Demonstrates That Eva Brooke's Testimony, Tainted by Improper Threats, Was "Crucial" to the Government's Case.

This is not a case where the testimony of an unimportant witness was affected by governmental misconduct. Mrs. Brooke's affidavit demonstrates that in the prosecutor's view alone she was critical to the government's case; indeed, as noted, the prosecutor himself told her that she was a "key witness" and her testimony was "crucial".

The prosecutor's analysis was clearly correct. The primary issue at the trial was the question of intent, whether the petitioner had signed tax returns for two years "wilfully and knowingly" that material amounts were omitted. The amount alleged by the indictment to have been omitted in 1967 ($24,168) was relatively small (less than 10%) in relation to his adjusted gross income ($259,051) for that year. The amount allegedly omitted in 1968 ($58,684) was challenged by defense counsel as inaccurate and as, in fact, only amounting to $6,229 or less than 5% of his adjusted gross income ($134,276) for that year.*

---

* The money allegedly omitted by petitioner in both 1967 and 1968 was a small portion of approximately $750,000 paid to him

(footnote continued on following page)

The government's proof on intent, as the prosecutor's statements to Mrs. Brooke imply, substantially boiled down to her testimony, which it now appears was tainted by governmental overreaching and intimidation, never disclosed at trial.* Petitioner's lack of knowledge was consequently critical and deprived him of the ability to effectively cross-examine the "key witness" against him. Accordingly, petitioner was deprived of a fair trial.

CONCLUSION

For the foregoing reasons, the Petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

JAMES SCHREIBER
330 Madison Avenue
New York, N.Y. 10017
Attorney for Petitioner
Jackson D. Leonard

(footnote continued from preceding page)

by Union Carbide Corporation ("UCC") under a contract for the design of a chemical plant in Taft, Louisiana. However, on February 1, 1968, the UCC contract was assigned by petitioner to his Subchapter S Corporation, Leonard Process Co., Inc. ("Leonard Inc."). Accordingly, only the monies paid by UCC to petitioner in January 1968 and omitted from his 1968 return (i.e., $6,229), were even arguably required to have been reported by him; the remaining $52,455 paid by UCC over the balance of 1968 (and allegedly omitted) belonged to Leonard Inc. (petitioner's Subchapter S Corporation), but not to petitioner personally, and therefore were not required to be reported on his personal 1968 tax return.

* This is clearly demonstrated by the prosecutor's summation; it relied and indeed concluded on the credibility of Mrs. Brooke's testimony.

APPENDIX

Affidavit of Eva Eileen Brooke.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

74 Cr. 599

UNITED STATES OF AMERICA,

against

JACKSON D. LEONARD,

Defendant.

LONDON
ENGLAND } ss.:

EVA EILEEN BROOKE, being duly sworn, deposes and says:

I am a citizen and resident of England. On January 16, 1975 I testified as a witness for the Government in the case of *United States of America* v. *Jackson D. Leonard*, 74 Cr. 599, in Federal Court in Manhattan, New York City.

The circumstances of my appearing as a witness were as follows:

In November or December 1974, while I was in Oklahoma City winding up my late husband's affairs, I was served with a subpoena and thereafter met in New York with Assistant United States Attorney Cullen MacDonald, who interviewed me for several hours concerning conversations which I and my late husband had had with Mr. Leonard. Mr. MacDonald instructed me not to contact Mr. Leonard.

In January 1975 I was at my home in England when I received a telephone call from Mr. MacDonald telling me that he wanted me to fly to New York to testify against

Affidavit of Eva Eileen Brooke.

Mr. Leonard and that he had obtained a second subpoena directing me to appear in New York as a witness.

I told Mr. MacDonald that I did not wish to testify against Mr. Leonard and that, as a result of the after effect of an automobile accident, I was too ill to travel.

Mr. MacDonald told me that he expected me to be a "key witness" and that my testimony would be "crucial" and that, if necessary, he would furnish me with medical assistance. I repeated that I was not willing to travel to New York.

During the next few days I received several further telephone calls from Mr. MacDonald insisting that I must come to New York. I understand that Mr. MacDonald also called my doctors in England concerning the state of my health.

I continued to tell Mr. MacDonald that I was not willing to fly to New York. I then received a telephone call from someone at the American Embassy in London, who also told me that I had to testify and that the U S Government was prepared to have a nurse accompany me to New York.

I then tried to call Mr. MacDonald in New York to tell him once more that I was not willing to travel. I spoke to a man who said he was Mr. MacDonald's assistant and that Mr. MacDonald was in court. When I told this man that I was not willing to travel to New York, he became very rude and told me that if I did not come to New York, the United States Government would have me arrested in England and extradited to the United States and that in the future I would never be allowed into the United States again.

The next day I received a further call from Mr. MacDonald telling me to testify. By that time I was exhausted from the daily pressure and terrified that if I failed to come to the United States, I would be subject to arrest and extradition.

Affidavit of Eva Eileen Brooke.

I finally agreed to fly to New York despite the fact that my doctors had advised me not to travel. I was met in the TWA baggage area by two men who said they were from Mr. MacDonald's office and escorted me to a car which took me directly to the federal courthouse where Mr. MacDonald put me in the witness stand after again interviewing me for a few minutes.

Subsequent to my testimony, I was interviewed by Mr. Leonard's lawyer but did not disclose to him the circumstances under which I had come to the trial.

I have since learned that the threats to have me arrested and extradited were false and that, as a citizen and resident of England, I could not have been compelled against my will to travel to New York to testify against Mr. Leonard.

I have been asked by Mr. Leonard and his lawyers to furnish this affidavit. I do so freely without any threats or inducements.

EVA EILEEN BROOKE
Eva Eileen Brooke

Sworn to before me
this 8th day of March, 1976.

M. J. SCANNALL
NOTARY PUBLIC OF LONDON, ENGLAND
My commision expires with life.

(SEAL)

Affidavit of Eva Eileen Brooke.

GREAT BRITAIN AND NORTHERN IRELAND
LONDON, ENGLAND
EMBASSY OF THE UNITED STATES OF AMERICA } ss.

I, ROBERT E. WATKINS, JR. Vice Consul of the United States of America residing at London, England, duly commissioned and qualified do hereby certify that

MARTIN JOHN SCANNALL

whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof a Notary Public at London, England, duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said

MARTIN JOHN SCANNALL

on the annexed certificate with a specimen of his signature filed in this Embassy; that I believe his signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this eighth day of March in the year of Our Lord one thousand nine hundred and seventy-six.

ROBERT E. WATKINS, Jr.
Robert E. Watkins, Jr.
Vice Consul of the United States of America at London, England.

(SEAL)

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No. 75-1016

In the Supreme Court of the United States

OCTOBER TERM, 1975

JACKSON D. LEONARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
ROBERT E. LINDSAY,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (Pet. App. A 1a-29a) and its supplemental opinion on petition for rehearing (Pet. App. B 30a-32a) are reported at 524 F. 2d 1076.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1975, and petitioner's petition for rehearing with suggestion for rehearing *en banc* was denied on November 18, 1975 (Pet. App. B 30a). By order dated December 5, 1975, Mr. Justice Marshall extended the time within which to file a petition for a

writ of certiorari to and including January 17, 1976 (Pet. App. H 57a). The petition for a writ of certiorari was filed on January 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence that petitioner submitted a false affidavit to an Internal Revenue agent during audit and made a false statement on his 1971 income tax return was properly admissible in his prosecution for filing false income tax returns for 1967 and 1968.

2. Whether *revenue agents* of the Internal Revenue Service, prior to interviewing petitioner in a noncustodial setting, were required to warn him of his rights because of the Service's announced policy that *special agents* give such warnings prior to interviewing persons suspected of possible criminal tax violations.

3. Whether an Internal Revenue Service mail watch designed to identify mail from Swiss banks by examining only the outsides of the envelopes and opening none of the mail violated the Fourth Amendment.

4. Whether the government improperly obstructed petitioner's interviews of prospective witnesses.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of filing false income tax returns understating the amount of his income, in violation of 26 U.S.C. 7206(1). The two

counts respectively charged petitioner with the omission of $24,168 of income from his 1967 tax return and the omission of $58,684 of income from his 1968 return (Pet. App. A 2a). The trial court sentenced petitioner to concurrent terms of 18 months' imprisonment, with 15 months suspended, and he was fined $5,000 on each count and ordered to pay the costs of prosecution (*ibid.*). The court of appeals affirmed (Pet. App. A 1a–29a; Pet. App. B 30a–32a).

In 1968 and 1969, the Internal Revenue Service requested the Postal Service to conduct a surveillance of mail coming into New York City from Switzerland during early 1968 and 1969. This request was made because the New York Regional Office of the Internal Revenue Service had become concerned over possible losses of income taxes through the use of secret Swiss bank accounts (Pet. App. A 10a). The Postal Service agreed, and during those periods a postal inspector and special agents of the Internal Revenue Service photostated by means of high speed copiers the faces of certain air mail envelopes mailed from Switzerland to New York (A. 405a–406a).[1] This procedure was part of what was known as the Foreign Bank Account Project. The result of the work was that the Service selected for audit about 100 persons in New York City (Pet. App. A 10a-11a). Although petitioner was

[1] "A." references followed by a lower case "a" after the page number are to the first 545 pages of Vol. I of petitioner's appendix in the court of appeals. "A." without any lower case "a" following the page number refers to the pages following page 545a, which are numbered as follows: Volume I (pp. 1–142), and Volume II (pp. 143–1029).

one of those persons, the Service had already decided to audit him for other reasons (Pet. App. A 11a).

The evidence in this case showed that in 1967 petitioner, a chemical engineer, entered into a contract with Union Carbide Corporation for engineering services in connection with the construction of two chemical plants (Pet. App. A 3a). Petitioner was to receive two types of fees. The first type consisted of various lump sum payments and later periodic payments. There was no evidence that any of the first type of payment was unreported, and the indictment against petitioner did not so charge (*ibid.*). The second type of payment was a ten percent override on Union Carbide's reimbursements for amounts paid by petitioner to certain subcontractors. Petitioner did not report any of these ten percent overrides as income for 1967 or 1968 (*ibid.*). Petitioner never deposited the checks representing the ten percent overrides ($24,168 in 1967 and $58,684 in 1968) but either cashed them or used them to purchase travelers' checks (Pet. App. A 3a–4a).

During the ensuing audit, the internal revenue agents asked petitioner whether he had any foreign bank accounts. Petitioner replied that he had no foreign bank accounts except for one in an Australian bank which was related to an engineering project in Australia in which he was engaged (Pet. App. A 12a). Petitioner signed an affidavit to that effect, with the further claim that he had not had "any transactions or dealings of any nature with any foreign banks" except

for nominal currency conversions during travel abroad and the Australian project (Pet. App. A 12a and n. 5). In the course of the audit, the agent also asked petitioner to show him his agreement with Union Carbide. Before petitioner exhibited the contract to the agent, he made a "clumsy attempt to delete the 10% override provision from the copy of the contract" (Pet. App. A 5a). The agent thereupon continued his audit and requested additional information from Union Carbide. On the basis of this information, the agent recommended that the matter be referred to the Intelligence Division for a fraud investigation. The recommendation was accepted and a criminal investigation was commenced with a special agent in charge. Thereafter, the agents warned petitioner of his constitutional rights at the beginning of each interview (Pet. App. A 12a–13a).

At trial, an official of Chase Manhattan Bank testified that in 1968, he personally delivered to petitioner a total of $383,000 in official Chase Manhattan checks made payable to petitioner on remittance instructions from the Banque Cantonale de Zurich. Petitioner used most of the checks to pay off a personal bank loan (Pet. App. A 13a).

A second witness, Eva Brooke, testified that in the summer of 1971, petitioner offered her husband an employment arrangement in which half of his compensation would be deposited in a Swiss bank account. During this conversation, petitioner admitted to Eva Brooke that he had a Swiss bank account. The govern-

ment thereupon introduced petitioner's 1971 tax return into evidence in which he stated that he had no foreign bank account during 1971 (Pet. App. A 13a–14a).

ARGUMENT

1. It is unquestioned that petitioner's tax returns for the years at issue were false because they omitted large amounts of income in each of the two years. The only issue before the jury was whether petitioner willfully filed false returns (A. 312a).

Petitioner first argues (Pet. 22–26) that proof of his false statement in his 1971 tax return and in his 1969 affidavit submitted to the revenue agent should not have been admitted into evidence. But these acts were similar to the misconduct charged in the indictment—making false statements on income tax returns—and evidence of those similar acts was admitted only on the issue of willfulness (A. 980–981).

It is well established that evidence of similar crimes is admissible when it is probative with respect to intent, an element in the crime, identity, malice, motive, a system of criminal activity, when the defendant has raised the issue of his character, or when the defendant has testified and the prosecution seeks to impeach his credibility. See *Spencer* v. *Texas,* 385 U.S. 554, 560–561. In criminal tax cases, the general rule is that proof of similar acts is admissible on the issue of willfulness. See, *e.g., United States* v. *Egenberg,* 441 F. 2d 441, 443–444 (C.A. 3); *United States* v. *Jernigan,* 411 F. 2d 471 (C.A. 5); *United States* v. *Taylor,* 305

F. 2d 183 (C.A. 4). In determining whether to admit such evidence, the trial judge is required to consider whether the probative value of the evidence is outweighed by its possible prejudice. *Spencer* v. *Texas, supra,* 385 U.S. at 561; *United States* v. *Deaton,* 381 F. 2d 114, 117 (C.A. 2).

Here, petitioner's willingness to submit a false affidavit to the Internal Revenue Service agent swearing that he had no "transactions or dealings of any nature with any foreign banks" (Pet. App. A 12a, n. 5) and to subscribe to a false statement on his 1971 tax return that he had no foreign bank accounts (when the evidence showed that he admitted to Eva Brooke that year that he did have a Swiss bank account) were relevant to show his general lack of truthfulness in his tax returns and in his statements to the federal tax authorities. While this evidence was probative as to the accuracy of petitioner's sworn statements to the Internal Revenue Service, there was solid evidence that petitioner willfully understated his income on his 1968 and 1969 returns. Thus, contrary to petitioner's claim (Pet. 23) that he was really convicted of having a Swiss bank account rather than on the charges in the indictment, his handling of the Union Carbide override checks (cashing them or converting them into travelers' checks rather than depositing them) as well as his "clumsy attempt" (Pet. App. A 5), to delete the ten percent override provision from the copy of his contract with Union Carbide

which was shown to the investigating agents, was sufficient to support a guilty verdict, wholly apart from the peripheral issue of the Swiss bank account.[2]

There is, moreover, no conflict between the decision below and *United States* v. *Lawrance,* 480 F. 2d 688, 691 n. 6 (C.A. 5), or *Kraft* v. *United States,* 238 F. 2d 794, 802 (C.A. 8). While there are dicta in those cases which suggest that to be admissible similar crime evidence must be "plain, clear and conclusive," the evidence here was sufficient to have enabled the jury to conclude that petitioner did have a Swiss bank account and that he lied to the Internal Revenue Service in swearing that he had no such account.[3] The transaction with the Chase Manhattan Bank checks and the testimony of Eva Brooke established the falsity of petitioner's statements. Although there was no

[2] *Bronston* v. *United States*, 409 U.S. 352, upon which petitioner relies (Pet. 22), is distinguishable. There, the Court reversed a perjury conviction because the defendant's answers to the prosecutor's questions, while misleading, were all truthful. Here, on the other hand, there was competent testimonial evidence from which the jury could infer that petitioner's affidavit submitted to the revenue agent and his negative answer to the foreign bank account question on his 1971 tax return were both false.

[3] The trial court was convinced that there was a "square conflict" between the representations in petitioner's 1969 affidavit and the other evidence of their falsity, even without considering the effect on that issue of Eva Brooke's testimony as to petitioner's 1971 admission that he had a Swiss bank account (A. 500). Nevertheless, the trial judge fully protected petitioner's rights by giving the jury a limiting instruction on how the evidence of similar acts was to be used, if at all. There was accordingly no departure from the "wide range of discretion" given to the trial court in this matter. *United States* v. *Deaton*, 381 F. 2d 114, 118, n. 3 (C.A. 2).

direct evidence of the existence of the Swiss bank account, that was due to the secret nature of a numbered Swiss account. However, it does not mean that the evidence did not have a plain, clear and convincing character. Thus, while the court of appeals expressed the view (Pet. App. A 23a) that a preponderance of the evidence standard is the correct test for admission of evidence of similar crimes (see *Lego* v. *Twomey,* 404 U.S. 477, 482–487), there is no reason to believe that the evidence of petitioner's similar crimes would not have met the "plain, clear and conclusive" dicta of *Kraft and Lawrance.*[4] Whatever abstract differences of view may exist among the courts of appeals, there is no conflict of decisions "on the same matter" within the meaning of Rule 19(1)(b) of the Rules of this Court.

2. Petitioner further argues (Pet. 14–19) that in failing to warn him of his constitutional rights when they first interviewed him, the revenue agents violated the policy of the Internal Revenue Service, as announced in a press release. In so contending, petitioner

[4] The situations in *Kraft* and *Lawrance* are distinguishable. *Kraft* involved a mail fraud prosecution and the evidence of similar crimes was letters to the defendant intimating that five years before he had been dilatory in making refunds to customers in a similar business.

In *Lawrance*, a prosecution for selling narcotics in the absence of the appropriate taxpaid stamps in violation of 26 U.S.C. 4704(a), the government sought to introduce evidence of similar narcotics sales by the defendant as relevant to the question of intent. However, the court held that this evidence was inadmissible because the defendant's intent in his prior sales was not an element of the statutory tax crimes for which the defendant was charged.

asserts that the decision below conflicts with *United States* v. *Leahey*, 434 F. 2d 7 (C.A. 1); *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4); and *United States* v. *Sourapas*, 515 F. 2d 295 (C.A. 9). Those cases are distinguishable for they hold that when *special agents* fail to give the warnings prescribed by the procedures of the Internal Revenue Service, statements obtained from the taxpayer must be suppressed on due process grounds. Here, however, the agents in question were revenue agents whose function is to conduct civil tax audits and not criminal investigations. Accordingly, the court of appeals (Pet. App. A 20a) correctly found it unnecessary to reach the question whether it would follow those cases.[5] Since petitioner was given warnings of his constitutional rights when his case was referred for criminal investigation to special agents of the Intelligence Division, procedures of the Internal Revenue Service were not violated.

There is no basis for petitioner's argument (Pet. 14–19) that the investigation of his tax liability was criminal in nature from its inception because the relevant postal regulations contemplate that the mail cover is necessary to obtain information "regarding the commission or attempted commission of a crime" (Pet. 15; Pet. App. E 36a). Petitioner argues here, as

[5] Thus, as petitioner concedes (Pet. 2n., 19n.), the question presented in *Beckwith* v. *United States*, No. 74–1243, argued December 1, 1975, as to whether a special agent investigating possible criminal tax violations must give a taxpayer *Miranda* warnings prior to interviewing him, is likewise not involved in this case.

he did in the court below, that unless the purpose of the mail cover was to unearth crime it was illegal under the postal regulations, and that if it was legal, the tax investigation was criminal and the revenue agents should have warned him of his constitutional rights. But the court of appeals did not find itself "pinioned between the horns of [this] dilemma," stating (Pet. App. A 21a):

> The mail cover came within the Postal Regulations because IRS had reason to believe that crimes under the revenue laws were being committed by some taxpayers through the use of Swiss bank accounts. It does not follow that every person whose name turned up in the print-out as probably having a Swiss bank account was suspected of committing such a crime. In fact the audit disclosed no sufficient evidence that Leonard had committed a crime by having a Swiss bank account. What ultimately led Agent Laski to recommend a criminal investigation was the data furnished by UCC, which showed, not a "kick-back" as represented by the informer, but a failure to report the 10% overrides which Leonard had received.

3. Petitioner further contends (Pet. 19–22) that the Swiss mail watch conducted by the Postal Service at the request of the Internal Revenue Service was illegal and therefore its fruits should have been suppressed. Although the Fourth Amendment may prohibit a warrantless opening of sealed letters and packages (*Ex parte Jackson*, 96 U.S. 727), there was no

such opening here.[6] All that was done was to photocopy the outside of certain envelopes.[7] As the court of appeals pointed out, "The IRS was confronted with a serious problem in the use of Swiss bank accounts to evade the revenue laws" (Pet. App. A 15a), and even if copying the outside of envelopes may be considered a search, here it was not an unreasonable one for there could be no reasonable expectation of privacy with respect to the outsides of envelopes in the stream of international mail, "which are subject to inspection and even in some cases to opening in aid of the enforcement of the customs laws" (Pet. App. A 16a).[8]

4. Petitioner also claims (Pet. 26–29) that the government improperly obstructed his interviews of prospective witnesses, particularly agents of the Internal Revenue Service, by directing them not to answer some of petitioner's questions. However, the district court was correct in refusing to order, as petitioner

[6] Petitioner's statement that the special agents "intercepted, inspected and photocopied mail * * *" (Pet. 6) may tend to create the impression that some of the mail was opened. In fact, no mail was opened and the photocopying was limited to the faces of the envelopes (A. 375a–376a).

[7] The photocopying did not cause the slightest delay in delivering any person's mail (A. 423a).

[8] Petitioner also argues (Pet. 20) that mail watches must necessarily be limited to specific individuals who were suspected of having committed crimes. But, as the court of appeals correctly pointed out, there is no reason to read the postal regulations so narrowly, nor did the Postal Service do so "and its interpretation of its internal regulations is entitled to weight. See 4 Davis, *Administrative Law Treatise*, Sec. 30.12 at 261 & n. 12 (1958)" (Pet. App. A 16a–17a).

requested, either the prosecutor's total exclusion from petitioner's deposition of the agents or otherwise to direct that the prosecutor not instruct and advise those witnesses "what questions to answer and not to answer" (A. 302a). Investigative agents of the government are in effect part of the prosecution team and they are not required to submit to pretrial interview and examination by counsel for the defense. A defendant's pretrial rights to discovery are governed by Rule 16 of the Federal Rules of Criminal Procedure, which makes no such provision. Where, as here, seven government agents have submitted to such pretrial questioning by defense counsel and provided substantial information not otherwise producible before trial under the rules, petitioner obtained far more information than contemplated by the rules of criminal discovery. At all events, as the court of appeals observed (Pet. App. A 28a), petitioner was not prejudiced in the slightest degree by the infrequent interventions of the prosecutor at these interviews.[9]

[9] Petitioner also contends (Pet. 29–32) that the government improperly used a Letter Rogatory to obtain the presence of Eva Brooke, a British citizen, at the trial. The court of appeals answered this argument in the following terms, upon which we rely (Pet. App. A 29a):

"Counsel makes a variety of attacks, unnecessary to detail, on the methods by which the prosecution secured the presence of Mrs. Brooke. Apart from the fact that it is not clear that these objections were raised below and that they are of doubtful merit, the short answer is that impropriety in the method by which the prosecution has obtained the attendance of a witness, while a proper subject for cross-examination or proof insofar as the impropriety may go to the weight of the witness' testimony, is not of itself a ground for reversal."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ROBERT E. LINDSAY,
Attorney.

APRIL 1976.

U.S. GOVERNMENT PRINTING OFFICE: 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1016

JACKSON D. LEONARD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF JACKSON D. LEONARD

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REPLY BRIEF OF JACKSON D. LEONARD

Introduction

Petitioner submits this brief in reply to the brief for the United States* in opposition to Leonard's Petition for Certiorari. Before turning to the government's legal and

*"U.S. Brief" refers to the brief filed by the Solicitor General; "Petition" refers to the Petition for Certiorari filed by Jackson D. Leonard; "PA" refers to the Appendix in the Petition; "Supplement" refers to the Supplement to the Petition; "SPA" refers to the Appendix in the Supplement; "G. Br." refers to the government's brief in the Court of Appeals; "A. Br." to appellant's brief in the Court of Appeals; "GX" to government trial exhibits; "DX" to defendant's exhibit; "CX" to court exhibits; "DXH" to defendant's hearing exhibits; "GXH" to government's hearing exhibits; "A" to appendix in the Court of Appeals; "E" to the exhibit volume in the Court of Appeals.

factual arguments, however, which, for the reasons set forth below, Leonard contends are without merit, Petitioner wishes to call to the Court's attention the fact that the government's brief was not served on Petitioner's counsel until April 15, 1976, and was apparently not mailed until April 13, 1976, although this Court, on March 12, 1976, ordered the government to file its brief on or before March 31, 1976.

ARGUMENT

POINT I

The IRS investigation of Leonard was clearly a criminal investigation. It was a direct outgrowth either of the FBA project or of an informant's allegations.

Notwithstanding the criminal nature of the investigation, the IRS agents did not give Leonard at the outset the warnings the IRS's own regulations require. Consequently, this Court is faced with a conflict between the First, Fourth and Ninth Circuits, and the Second Circuit, on whether the IRS should be compelled to follow its announced procedures in criminal tax investigations.

A. The investigation of Leonard was criminal from its inception.

The investigation of Leonard was triggered either by data disclosed in the course of the IRS's massive mail watch, one of the initial phases of the Foreign Bank Account ("FBA") project, or by an informant's allegations of criminal misconduct. In either case, for the reasons set forth below and in Leonard's Petition herein, the investigation of Leonard was criminal from its inception.

1. The FBA project was a criminal investigation and was conducted as a criminal investigation.

Although the government has now apparently abandoned its position below that the FBA project was merely designed to develop "civil audit techniques", it still persists in its denial that the FBA project was an Intelligence Division program devoted to detecting and prosecuting American taxpayers who were maintaining Swiss bank accounts, and that the indictment and conviction of Leonard was a direct outgrowth of that effort.

A review of the record, however, clearly demonstrates the criminal nature of the FBA project and the impropriety of the use against Leonard of information developed as a result.

Since petitioner's principal brief in support of his Petition for Certiorari describes in some detail the FBA project and particularly the "Swiss mail watch" (which was an integral part of it), this reply shall merely set forth, without substantial elaboration, the principal factors that demonstrate the criminal nature of the FBA project:

(a) The FBA project originated in the Intelligence Division of the IRS (which conducts only criminal investigations), and the Swiss mail watch was initially performed solely by Special Agents, who had previously obtained lists of Swiss bank postage meter numbers and thereafter produced computer printouts of taxpayers and the Swiss banks with which they corresponded.*

(b) The IRS, pursuant to Part 861 of the Post Office Manual, represented to the Post Office that the FBA project was a criminal investigation.**

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* Only subsequently did Revenue Agents become involved and then only under the general direction of the Intelligence Division. See *infra*, page 4.

** The petitioner's argument with respect to this representation has been mischaracterized both by the government and the Court of Appeals, which asserted that it did "not follow that *every* per-

(footnote continued on following page)

(c) Revenue Agents who worked on the FBA project operated under the supervision of the Intelligence Division, and together with the Intelligence Division, selected the taxpayers who were targeted for investigation.*

(footnote continued from preceding page)

son whose name turned up in the print-out as probably having a Swiss bank account was suspected [by the IRS] of committing such a crime." U.S. Brief, p. 11; PA p. 21a. This has never been petitioner's position. Following the mail watch, the Special Agent in charge of the FBA project (with the assistance of a Revenue Agent) reviewed untold numbers of tax returns of those persons who surfaced from the mail watch. The record below is clear that the 110 taxpayers in New York alone targeted for investigation in the FBA project were selected not by the normal criteria then applicable to whether a taxpayer should be *audited*, but rather were selected because their returns failed to disclose any Swiss bank account. In short, the targeted taxpayers, including Leonard, were selected for FBA investigation precisely because the IRS "suspected [they were] committing such a crime", demonstrating that the IRS viewed the FBA project as a criminal investigation.

Indeed, this fact would likely have emerged from the written representation by the IRS to the Post Office, which has *never* been produced. In fact, the Court of Appeals' decision below is based on what it assumes must be contained in such a letter. As noted *infra* in Point IV, the government's obstruction of petitioner's pretrial questioning of prospective witnesses on the subject of the mail watch prevented petitioner's discovery that there was a requirement of a letter and further that there were internal (non-public) Post Office regulations on the subject. (These regulations were not officiallly published until three days after Leonard was sentenced. Counsel discovered them only by virtue of a Freedom of Information Act request made while this case was on appeal to the Second Circuit. See Appendix E to Petition, p. 35a.) Further, when Leonard learned just prior to trial that there had been a mail watch, he issued subpoenas to the IRS for all relevant documents. Although Leonard was unaware that there were postal regulations which required the IRS to obtain written authority from the Post Office for the massive mail watch, the subpoenas would have produced the missing letter, if the trial court had not quashed it. The contents of the IRS letter to the Post Office, if one even exists, remain to this date a complete mystery.

* This is standard IRS procedure in criminal tax investigations. In such investigations, a Special Agent runs the investigation and is assisted by one or more Revenue Agents who work under his direction.

(d) The practices used in conducting the "audits" of taxpayers so selected were not the routine audit procedures normally followed but were criminal investigation techniques, programmed by the Special Agent in charge, which included an official policy of withholding from the taxpayer information obtained through the mail cover* and surreptitiously avoidng a taxpayer's "accountants or attorneys" in order to confront the taxpayer personally and obtain incriminating statements directly from him.** Indeed, the Revenue Agents were given a special booklet of instructions prepared by the Intelligence Division (with the assistance of the Audit Division), on how to conduct the FBA "audits".

(e) The follow-up tactic of seeking an affidavit confirming the oral denial, which was done at the direction of the Intelligence Division, served no legitimate Audit Division purpose (since the affidavit was only

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* It was apparently the decision of the Special Agent in charge of the FBA project that Revenue Agents withhold mail cover information from the taxpayer during the audits. This was clearly a criminal investigatory technique. Since an auditor's function is to determine the correct tax liability on the basis of all the facts, he necessarily must follow the practice of advising the taxpayer of all entries or apparent omissions which require explanation. Therefore, the concealment of facts which might elicit additional information is inherently inconsistent with basic auditing objectives and therefore contradicts the government's contention that the FBA project was strictly "civil". Despite this, concealment was the official policy.

** The use of Revenue Agents (who were instructed to maneuver personal confrontations with the taxpayer) to conduct the alleged "audits" was obviously designed to conceal from the taxpayer the true criminal nature of the investigation and to obtain incriminating statements without the benefit of the required warnings. The government's claim below that the FBA investigation was strictly a "civil project designed to perfect audit techniques relevant to foreign bank accounts" is at most only a small fraction of the story, and at worst, a patent sham. Additionally, the FBA investigation was "top secret" and was not disclosed even to other IRS agents except on a "need-to-know" basis (A 283a), which is clearly characteristic of a criminal (not a civil) investigation.

obtained if the agent doing the "audit" found no independent corroboration of the information derived from the mail watch).*

(f) During the alleged "audit" stage of the FBA project, the Special Agent directing the investigation referred some 20 taxpayers (who had orally denied having a Swiss account and who had signed the affidavits confirming the denial) directly to the criminal division of the U.S. Attorney's Office for the Southern District of New York for questioning before federal grand juries.**

2. Informant's allegations are clearly treated by the IRS as bases for criminal proceedings.

Although the government concedes that the "audit" of Leonard was generated at least in part by an allegation by an informant that Leonard was receiving illegal kick-backs, the government has wholly failed to respond to petitioner's contention that the IRS's firm practice in 1968 was to refer informants' reports of criminal misconduct to the IRS's Intelligence Division, which as noted, conducts only criminal investigations.***

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* Indeed, this tactic demonstrates what Agent Morris unwittingly admitted at the pretrial hearing, namely that the affidavit was a "technique" to squeeze an admission out from the taxpayer who, if he "ha[d] to put something in writing . . . he's apt to think twice rather than just saying 'No, I don't have an account' . . . and that was the purpose of this [affidavit]." (A 370a)

** The standard practice in the IRS is for cases audited by Revenue Agents (in the Audit Division) to be referred to the Intelligence Division when there appear to be criminal aspects. Thereafter, the procedure is for the Intelligence Division, after it own investigation (with the assistance of the Revenue Agent) to refer such cases to the Justice Department and the U.S. Attorney's Office for prosecution. The fact that some 20 taxpayers were referred directly from the FBA project to a local federal prosecutor's office clearly demonstrates that the FBA project was a criminal investigation and not a "civil audit project", as contended by the government before the Court of Appeals.

*** Indeed, at the pre-trial hearing, Revenue Agent Morris (the only witness called by the government) testified that in New York,

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The government seeks to avoid the obvious consequences of this policy by lamely arguing that the informants' allegations proved to be untrue and that, as a consequence, they did not result in Leonard's indictment or conviction. Entirely overlooked by the government, however, is the fact that the money omitted by Leonard in 1967 and 1968 was the very money that the informant erroneously claimed as "illegal kickbacks". Further there is nothing in the record that suggests that Leonard's 1967 and 1968 tax returns would have been investigated at all but for the FBA project or the informants' allegations, and that investigation clearly developed the incriminating evidence that Leonard failed to report all of his income in those years.

B. It is immaterial that the "audit" was performed by Revenue Agents as distinguished from Special Agents.

Although the government concedes that Leonard was not given any warnings that he was the subject of a criminal investigation during the first two years of his "audit" (a period during which Leonard allegedly made a number

(footnote continued from preceding page)

such allegations were only sent to the Audit Division for preliminary investigation when there was a "manpower" shortage in the Intelligence Division:

> "Q. 'Information items' which are sent to the Internal Revenue Service are referred to the Intelligence Division, are they not? A. *At first, yes.*
>
> Q. And then, after the special agents look at them, they sometimes give them to the revenue officers [sic, revenue agents] to investigate; is that right? A. The revenue agent. Yes. The revenue officer is another person entirely.
>
> Q. The revenue agent. I beg your pardon. A. Yes. A certain portion are sent to Intelligence, and *if they can't handle them, because of limited manpower* [then] *they send it to the Auditing Division,* which screens it out for productivity and sends it to—
>
> Q. They keep some themselves and give others to Audit; is that right? A. Yes.
>
> Q. And was that done in the Leonard case with respect to the information item? A. I presume so.
>
> Q. You don't know? A. No." [Emphasis added] (A. 414a-415a).

of damaging disclosures and signed the "Swiss bank affidavit"),* it contends that no violation of IRS procedures thus resulted because the "audit" was conducted by a *Revenue* Agent and not a *Special* Agent, and the IRS news releases refer only to the conduct required of *Special Agents.*

Here the government is clearly exalting form over substance, since there can be no doubt that Revenue Agent Laski was performing the functions of a Special Agent throughout his investigation of Leonard. As the district court stated unequivocally in *United States* v. *Harary,* 70 Cr. 1104 (C.M.M.) (SDNY 4/23/71), 71-1 USTC § 9362, the standards of conduct set forth by the IRS news release apply equally to *Revenue* Agents (as well as Special Agents) conducting non-custodial criminal investigations.

Indeed this Court has also emphasized in *Mathis* v. *United States,* 391 U.S. 1 (1968), that it is the reality of the situation, rather than the nominal status of the government employee, that determines whether there is a requirement to give warnings.

There is even greater need for warnings where a criminal investigation is conducted by *Revenue* Agents, instead of *Special* Agents, since the use of a Revenue Agent in a criminal investigation is inherently misleading and is likely to lull the taxpayer into a false sense of security (especially in view of the IRS's public press releases on the subject). See *United States* v. *Sicillia,* 475 F.2d 303, 308, 310 (7th Cir. 1973), *cert. denied,* 414 U.S. 865 (1973).

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* The government brief obscures this fact by asserting that after Leonard's case had been officially referred to the Intelligence Division from the FBA project, the Special Agents who *thereafter* interviewed Leonard gave him the required warnings. However, the damage had already been done since the "Revenue Agent" assigned to the FBA project had previously obtained from Leonard incriminating documents and information, without the benefit of the warnings.

Moreover, since the government conceded that the only time Revenue Agents are used to investigate informants' allegations is when Special Agents are not available for such work, the fact that the investigation of Leonard commenced when there was a manpower shortage in the Investigation Division should not lead to the conclusion that Leonard was not entitled to warnings. Leonard's right to proscribed warning should not be dependent on the fortuitous occurrence that the informants' allegations happen to have been received in the summer of 1968 when many Special Agents were on vacation.

Consequently, this Court is faced with a conflict between the First, Fourth and Ninth Circuits, and the Second Circuit, on whether the IRS should be compelled to follow its announced procedures in criminal tax investigations, and only a decision of this Court can clarify the circumstances under which warnings must be given.

POINT II

The government concedes that the primary issue at trial was the defendant's wilfulness.

The proof of wilfulness consisted largely of the allegedly false Swiss-bank affidavit and Eva Brooke's testimony.*

Eva Brooke's testimony was "tainted" by improper threats which were not disclosed at trial.

There was in fact insufficient proof of the alleged falsity of the Swiss-bank affidavit.

The government concedes that "wilfulness" was the primary issue at trial, but fails to address itself to the cir-

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* The government contends that "wilfulness" was also allegedly shown by petitioner's assertedly "clumsy attempt to delete the 10% override provision from the . . . contract." However, the record demonstrates that this override was in fact actually deleted by Union Carbide Corporation ("UCC"). Initially two chemical plants were to have been built, the first in Taft, Louisiana and the

(footnote continued on following page)

cumstances surrounding its key evidence of "wilfulness", the testimony of Eva Brooke.

Since the Supplement to the Petition describes at length the improper threats and false statements made by the government to induce Mrs. Brooke, a British citizen and resident, to come to the United States to testify against petitioner, it is only necessary at this time to emphasize that the government's failure to bring these threats and statements to petitioner's counsel's attention at trial so deprived petitioner of the opportunity for full cross-examination of the government's key witness as to justify, on that fact alone, reversal of the conviction.

As the Second Circuit observed in an analogous situation in *United States* v. *Miller,* 411 F.2d 825, 831 (2nd Cir. 1969), when the government has a duty to disclose information about its dealings with a prosecution witness

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(*footnote continued from preceding page*)

second in South Charleston, West Virginia. The South Charleston plant, while planned, was never built. While this did not impair Leonard's right to the $750,000 in fees from UCC, his right to an additional 10% override on the engineering work for the South Charleston plant was cancelled since no such work was to be done, which is undoubtedly the reason why the provision had been crossed out on this particular copy of the UCC contract. Further, the government claims that this copy of the UCC contract was exhibited by Leonard to the agent during the investigation, U.S. Brief pp. 4-5. This contention is inaccurate; rather, his accountant, who had conducted the audit, showed the copy to the agent, which copy was probably a working copy. Indeed, a second marked-up work copy was also introduced by the government at trial, GX 67 at E 220, which deleted references to all monies to be paid to Leonard. This copy, containing a note from Leonard to his assistant and stating "Bob, for your info", was obviously an effort by Leonard to properly not reveal to his employee what he was being paid on the project. Thus, the alleged evidence of "wilfulness" relied upon by the government was entirely innocent. See also, GX 75, a letter written by Leonard to UCC, dated April 24, 1968, which discusses the deletion of the 10% override on the engineering work for the South Charleston plant.

and fails to discharge that responsibility:

> ". . . a motion for a new trial must be granted if there is a significant possibility that the undisclosed evidence *might* have led to an acquittal or a hung jury . . ." (Emphasis supplied)

Certainly that test is met here: Mrs. Brooke's testimony was procured by duress, a fact the jury would certainly be entitled to take into account in determining its credibility. Compare, *United States* v. *Badalamente,* 507 F.2d 12 (2nd Cir. 1974), *cert. denied,* 421 U.S. 911 (1975), where the Second Circuit reversed a conviction because the prosecutor did not reveal to defense counsel that a key government witness had sent a letter to the trial judge which indicated that the United States attorney's office had applied extreme pressure to make him testify.

The other alleged "similar act" evidence, the Swiss-bank affidavit, drafted entirely by Agent Laski, was literally true.•

The government contended below, however, that the $383,000 received by Leonard in 1968 from Chase Manhattan in the form of its own "official" checks established that Leonard had "dealings" or "transactions" with a foreign bank. This contention is without merit.

Leonard's receipt of the Chase Manhattan Bank checks in New York was a *direct* "dealing" or "transaction" with a domestic bank (Chase Manhattan Bank), and not a Swiss bank. There was no proof offered by the government that Leonard even knew that Chase had paid the money at the

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• The Swiss-bank affidavit reads as follows:

"(1) I do not now and I have not had any foreign bank accounts;" and

"(2) I have not had any transactions or dealings of any nature with any foreign banks or other representatives except for (specified loans in Australia and currency conversions.)" (GX 74 at E 281).

direction of a foreign bank, let alone that Leonard was the source himself. At most, the checks constituted an "indirect" dealing with a Swiss bank. Indeed the government conceded in its summation that the Swiss-bank affidavit did not address itself to indirect transactions—i.e. "it doesn't say anything about . . . indirect dealings with foreign banks" but nonetheless chided Leonard for the omission (A. 949).

More particularly despite the fact that a government agent had drafted the affidavit and thereby established the scope and extent of Leonard's denial, the government argued that the $383,000 in Chase Manhattan Bank checks were evidence that the Swiss bank affidavit was false, since (according to the argument then made) Leonard "should have disclosed" indirect transactions with a foreign bank (A. 949). Indeed, the Court of Appeals' characterization of Leonard's argument with respect to the literal truthfulness of the affidavit as "formal to an extreme" is tacit, but strong, acknowledgment of the validity of his position. It also refutes the government's claim here that this evidence would meet the "plain, clear, and convincing" standard in *United States* v. *Lawrance,* 480 F.2d 688 (5th Cir. 1973) and *Kraft* v. *U.S.,* 238 F.2d 794 (8th Cir. 1956).

Thus, in view of the real lack of evidence on "wilfulness," the prosecutor's analysis (stated to Mrs. Brooke) that its case rested on Mrs. Brooke, who was in its view a "key witness" with "crucial" testimony was clearly correct. Consequently, since her testimony was "tainted", Leonard's conviction should be reversed and a new trial granted.

POINT III

The government's argument on the mail watch fails to consider the issue raised by the Petition that the mail watch violated applicable Post Office regulations.

The unlimited scope of the FBA project mail watch, conducted by IRS agents, constituted a violation of the Post Office regulations.

The government's brief carefully refrains from responding to appellant's argument that the unlimited scope of the FBA project mail watch (in which all mail from Switzerland, lacking a return address, was intercepted and microfilmed over two four-month periods in 1968 and 1969) was improper under then current Post Office regulations.

As noted in the Petition in chief, the Post Office regulations simply do not authorize such a "dragnet" approach, but require "specificity" as to each mail cover subject for whom a law enforcement agency requests a mail watch. Petition page 21, Part 861.42b., *Post Office Manual.* Here, literally thousands (if not hundreds of thousands) of Americans had their mail from Switzerland photographed, where the government, prior to the mail watch, had absolutely no reason to believe that such persons were committing or attempting to commit a crime (A. 379a). Part 861, *Post Office Manual.* The government therefore appears to concede that the mail watch utilized in the FBA project violated Post Office regulations.

POINT IV

The petitioner was prejudiced by the prosecutor's obstruction of interviews of prospective witnesses. At the very least, the obstruction prevented him from discovering either the massive nature of the mail watch (until the hearing, which itself was scheduled on short notice) or the applicable (internal) Post Office regulations.

The defendant neither had access to nor knowledge of these regulations, which were only first published in the Federal Register March 11, 1975, three days after Leonard was sentenced.

Consequently, Leonard was prevented from obtaining the very document which might have demonstrated that the FBA project was an Intelligence Division operation and therefore a criminal investigation.

The government contends that the prosecutor's instructions to the prospective witnesses (who had voluntarily made themselves available) not to answer questions posed by Leonard during pretrial interviews concerning the "mail watch", the reason why Revenue Agent Laski initially asked Leonard about foreign bank accounts and conversations between the agents, did not prejudice the defendant. This contention is without merit.

First, it must be noted that the petitioner has never contended that *the government* was required to submit the prospective witnesses (who happened to have been agents) for pretrial interviews. Leonard, however, wrote each of seven specific prospective witnesses and asked that they make themselves available for interview. All seven thereafter voluntarily agreed to do so and in fact did. Accordingly, there is no validity to the government's position that petitioner's argument herein is an effort to obtain more pretrial discovery than permitted by the rules. U.S. Brief p. 13.

Consequently, after the witnesses voluntarily chose to make themselves available, it was completely improper for the prosecutor to have interfered with the interviews. *United States* v. *Matlock*, 491 F.2d 504 (6th Cir. 1974); *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir. 1966); *United States* v. *King*, 368 F. Supp. 130 (M.D. Fla. 1973); *Johnston* v. *NBC, Inc.*, 356 F. Supp. 904 (E.D.N.Y. 1973); *Coppolino* v. *Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967).

The obstruction by the prosecutor took a number of different forms. At the outset, even though the interviews were not to be civil depositions, the prosecutor insisted that the interviews be recorded by a court stenographer and Leonard consented (A. 477a-479a). Thereafter, the prosecutor instructed witnesses not to answer questions where its objections were limited only to the form of the question (E.g. A. 108a-109a, 113a-115a, 123a, 125a, 127a, 165a). Indeed, if the interviews were depositions taken for a civil case, such technical objections would not justify an instruction to the witness not to answer. Rule 30(c), F.R. Civ. Pr.

Second, when the prosecutor permitted at least one of the interviews to develop to a stage where Leonard's appetite had been whetted by the limited information that was disclosed (see, for example, Agent Schulman interview quoted at A. Br. 49-50), the government then insisted that if Leonard wanted further information he could obtain it at a price—the price being the waiver of his Fifth Amendment privilege. Indeed, although Leonard's counsel objected, the government stated the choice in dramatic terms:

> "Prosecutor: Great. If and when you want to tender his box and stop claiming the Fifth on all of the evidence he possesses, then I will change the rules [and permit unobstructed questioning] . . . (A. 244a)"

In short, the government offered Leonard unfettered access to the prospective witnesses on condition that he waive his

Fifth Amendment privilege and "tendered . . . all the evidence he possesse[d]", a Hobson's choice not unlike that disapproved by this Court in *United States* v. *Marchetti,* 390 U.S. 39 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968).

Where a prosecutor's conduct violates a defendant's constitutional rights, the defendant need not establish prejudice, since the misconduct may itself prevent a defendant from making such a showing. See *Gregory* v. *U. S., supra.*

Nonetheless there was substantial prejudice suffered by Leonard as a result of the course adopted by the prosecutor. The first time that Leonard's counsel learned that the IRS investigation of Leonard was an FBA project case was on January 6, 1975, when Laski revealed it during his interview (A. 316a-317a). The very next day, January 7, 1975, counsel immediately brought this to the attention of the court (A. 317a), and, since the case was to be tried the following day, made an oral motion because he had not "had time to type it up" (A. 316a).

The oral motion to suppress Leonard's statements and affidavit given to agent Laski was based on two arguments: first, that by conducting a criminal investigation (i.e., an FBA investigation), Laski was performing the function of a Special Agent and therefore, by IRS regulations, was required, but failed, to give Leonard specified warnings and, second, that there appeared to have been a "mail cover" which counsel "hope[d] to establish . . . as illegal."

At this stage, however, counsel was not sure that Leonard was actually the subject of a mail cover, since the government specifically blocked questions at Laski's interview that would have elicited this information (A. 122a, 123a). He therefore requested that the trial judge issue an order instructing the government, pursuant to the "Judge Otto Kerner" case [*United States* v. *Isaacs,* 347

F. Supp. 743 (N.D. Ill. 1972)], to inform him whether there was a mail cover (A. 320a-321a, 33a).

When the trial court asked "that Leonard here be informed as to whether there was a mail cover and the details of it", the government responded as follows:

> Prosecutor: "I am prepared to inform the court, I hope in helpful fashion, certainly not to the detail and to th[e] extent that the judge in Illinois asked for information. I have in my possession photostats or photographs of half a dozen envelopes addressed to Mr. Leonard both at his home and his home at Union Plaza. I will make those available to counsel.
>
> "I am informed that those were made back in 196— well, the time I am uncertain about. I think in the early months of 1968 and 1969 *by the postal authorities,* that is, the mail was passing through on the way to being delivered to Mr. Leonard." (A. 333a-334a) [Emphasis added]

The government then mentioned for the first time that there was an informant's report concerning the Treadwell payments and further that the mail watch "kicked out" information "at the same time" concerning Leonard's having correspondence with Swiss banks (A. 334a). However, at this point the government's disclosure was very limited; it merely confirmed that there had been a mail watch, while not disclosing its extent. Moreover, the prosecutor's statement that the photographs of the "half a dozen" envelopes were made "by the postal authorities" was ultimately established as inaccurate. In any event, the court scheduled a hearing for three days after, January 10, 1975 at 10:00 A.M.

Leonard immediately prepared subpoenas *duces tecum* for service on the District Director of the IRS, the Regional IRS Commissioner—New York and Regional Counsel, New York, and the Secretary of State and Swiss Desk Officer,

returnable on January 10th, the day the hearing was then scheduled (A. 419a, 389a).

However, on the follow ng day (and in fact on less than a half a day's notice) (A 389a), the government expedited the hearing date to that very afternoon, January 8, 1975, at which time the government called its one witness, Revenue Agent Bernard Morris, to testify about the "essentially civil nature" of the FBA project.

For the first time, it was revealed that there had been a massive mail watch, in which all envelopes from Switzerland arriving at Kennedy Airport and lacking a return address were microfilmed by Special Agents of the IRS (and not "by postal authorities" as previously represented) on machines which photographed 3,600 envelopes an hour (A. 375a-381a). It was only at this point that the unlimited nature of the mail watch was disclosed.

However, the applicable Post Office regulations were not yet published and therefore were not available to Leonard's counsel. Accordingly, the prosecutor's instructions to Agent Laski not to answer "mail watch" or Swiss bark questions prevented counsel from discovering that the IRS had represented (and indeed was required by internal Post Office regulations to represent) to the Post Office that it was conducting a criminal investigation.

Consequently, Leonard was severely prejudiced by the prosecutor's obstruction of his pretrial interviews of prospective witnesses. Indeed, the Court of Appeals' decision below stated that Leonard had failed to convince it that the FBA investigation was criminal. Leonard submits that there is overwhelming evidence that the FBA project was a criminal investigation and further that the

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• As noted, *supra*, footnote, page 4, the written request was never produced by the government below, although subpoenas served by the defendant, but quashed by the court, would have required production.

IRS intentionally used Revenue Agents, rather than Special Agents, to obscure that fact. In any event, however, the government's obstructions of interviews of the witnesses (who, it must be emphasized, voluntarily made themselves available) prevented Leonard from learning about and thus obtaining the very document which would have established what the Court of Appeals said was missing, namely, proof that the FBA project was an Intelligence Division operation and therefore a criminal investigation.

Thus, the prosecutor restricted petitioner's access to essential information which might have led to possible defenses and witnesses, and therefore improperly hampered his ability to prepare a defense.

CONCLUSION

For the foregoing reasons, the Petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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